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# COMMUNICATIONS LAW

*liberties, restraints, and the modern media*



JOHN D. ZELEZNY

# **Communications Law**

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# **Communications Law**

**Liberties, Restraints, and the Modern Media**

**Sixth Edition**

**John D. Zelezny**

**Attorney at Law**



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***Communications Law: Liberties, Restraints,  
and the Modern Media, Sixth Edition***  
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Cover Image: ©stevesm/istockphoto,  
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Library of Congress Control Number: 2009942287

ISBN-13: 978-0-495-79417-2

ISBN-10: 0-495-79417-1

**Wadsworth**  
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# Contents

Preface xiv

## CHAPTER ONE

### **The U.S. Legal System 1**

---

Studying the Law	1
Sources of Law	4
Constitutional Law	4
Statutory Law	6
Administrative Law	7
Case Law	9
Other Ways to Categorize Law	12
Civil Law Versus Criminal Law	12
Contracts Versus Torts	13
Court Systems and Jurisdiction	14
Federal Jurisdiction	15
State Jurisdiction	19
Special Problem: Cyberspace	21
The Judicial Process	25
Justiciable Controversy	25
Pretrial Procedure	26
Trial Procedure	28
Appellate Procedure	29
Administrative Proceedings	31
Summary Points	31
Discussion Questions	32
Key Terms	33

## CHAPTER TWO

### **The First Amendment 34**

---

Background: A Short History of Free Speech	34
Reasons for Freedom of Speech	38
Social Reasons	38
Individualistic Reasons	39
Rebuttal	40

Adoption of the First Amendment	41
Nature of the Guarantee	43
Liberty Versus Government Power	43
Expression Versus Conduct	44
Gathering and Distributing	46
Suspect Restrictions	47
Prior Restraints	47
Punishment After the Fact	50
Financial Burdens	52
Compelled Speech	54
Time, Place, and Manner Restrictions	57
Resolving Conflicts	59
Rights Not Absolute	59
Unprotected Speech	60
The Balancing Approach	63
Special Problem: Government Facilities and Media	69
The Forum Theory	69
The Student Press	70
Special Problem: Corporate Speech	74
Protecting Investment Markets	75
Protecting the Political Process	77
Waiver of Free Speech Rights	82
Summary Points	83
Discussion Questions	84
Key Terms	85

## CHAPTER THREE

## **Risks to Public Safety 86**

---

When to Censor?	86
Law and Order	88
Clear and Present Danger	89
The Incitement Standard	91
National Security	93
The Pentagon Papers Case	94
The H-Bomb Case	96
Wartime Access Restrictions	97
The Patriot Act	98
Personal Injury	99
Negligence Versus Incitement	99
Harm Through Imitation	100

Harm From Advice or Instruction	104
Harm Through Advertising	110
Summary Points	113
Discussion Questions	114
Key Terms	115

## CHAPTER FOUR

## **Damage to Reputation 116**

---

Evolution of Defamation Law	116
Development by the States	119
The Constitution Intervenes	120
Ingredients for a Lawsuit	121
Defamatory Content	121
The Meaning of <i>Defamatory</i>	121
Interpreting the Statements	124
Falsity	129
Burden of Proof	129
How False Must It Be?	130
Publication	135
Identification	136
Special Problem: Group Defamation	136
Fault	137
<i>New York Times Co. v. Sullivan</i>	138
The Meaning of Actual Malice	141
Gertz and the Negligence Standard	145
Categorizing the Plaintiff	147
Harm to Plaintiff	153
Awarding Damages	154
Limits on Damages	155
Matters of Private Concern	155
Privileges, Defenses, and Other Protections	156
Reports of Official Proceedings	157
Neutral Reporting	159
The Wire Service Defense	160
Retractions	161
Summary Judgment	162
Counterattacks by The Media	163
Anti-Slapp Statutes	163
Statutes of Limitations	165



Defamation in Cyberspace	165
ISP Liability	166
User Liability	169
Libel Tourism	170
Libel Reform Efforts	171
Reasons for Change	171
The Uniform Correction Act	172
Summary Points	173
Discussion Questions	174
Key Terms	175

## CHAPTER FIVE

## **Invasion of Privacy 176**

---

Origins of Privacy Law	176
Four Distinct Torts	178
Appropriation of Name or Likeness	179
Commercial Use	180
Name or Likeness	184
Consent	186
Special Problem: Deceased Celebrities	189
First Amendment Clash	189
Disclosure of Private Facts	190
Private Life	191
Highly Offensive Disclosure	193
Not Newsworthy	194
False Light	200
False Light Situations	201
The Elements and Privileges	203
Intrusion	204
Expectation of Privacy	204
Offensiveness	206
Use of Subterfuge	208
Public Places	211
Limits of Liability	212
Companion Torts	212
Fraud	213
Emotional Distress	214
Trespass	217
Criminal Statutes	218
Photo Stalking	218
Betraying Identity	218
Recording and Intercepting Calls	219

Privacy in Cyberspace	222
E-Mail and Websites	223
Collecting and Accessing Data	224
Summary Points	227
Discussion Questions	228
Key Terms	229

## CHAPTER SIX

## **Access to Places and Information 230**

---

Access to Places	230
Trespass on Private Property	232
Accident, Crime, and Disaster Scenes	237
Polling Places	238
Government Property	238
Government Proceedings	239
State Open Meeting Laws	240
The Federal Meetings Statute	243
Government Records	245
The Freedom of Information Act	245
State Open Records Laws	259
Selective Access by Government	263
Summary Points	266
Discussion Questions	266
Key Terms	267

## CHAPTER SEVEN

## **Media and the Justice System 268**

---

Media and Courts: A Unique Relationship	268
The Quest for Fair Trials	270
The Sixth Amendment Guarantee	271
The First Amendment Conflict	272
Warnings from the Supreme Court	272
The True Effect of Publicity	276
The Aftermath of <i>Sheppard</i>	277
Gag Orders and the First Amendment	278
Gagging the Media	279
Gagging Trial Participants	283
Access to Proceedings	285
Criminal Trials	286
Pretrial Proceedings	290
Executions	291

Civil Proceedings	292
Deportation Hearings	293
Special Problem: Juvenile Court	294
Special Problem: Cameras in The Courtroom	295
Ethics, Etiquette, and Court Coverage	299
Access to Evidence and Records	299
Keeping Media Secrets	302
Forced Disclosure and the First Amendment	303
Shield Laws	308
Legal Obligation to Sources	311
Police Searches	313
Contempt of Court	313
Summary Points	315
Discussion Questions	316
Key Terms	317

## CHAPTER EIGHT

## **Creative Property 318**

---

A Special Kind of Property	319
Copyright	320
Protected Works	321
Ownership	326
Formalities	333
Infringement	334
Licensing Agreements	337
Music Licensing	340
Special Problem: Cable Retransmission	343
International Protection	345
Fair Use	347
Applying the Factors	348
News, Images, and Fair Use	353
Parody and Criticism	354
Copyright in Cyberspace	355
Exclusive Rights in a Digital World	356
DMCA Immunity	357
Peer-To-Peer Piracy	359
Trademarks	361
Creation of Trademarks	363
Trademark Registration	365
Infringement	366
Dilution	367
Trademarks and Domain Names	369

Unfair Competition	371
Summary Points	374
Discussion Questions	375
Key Terms	376

## CHAPTER NINE

### **The FCC and Broadcast Licensing 377**

---

Introduction	377
The Rudiments of Broadcast Regulation	379
Use of the Spectrum	379
The Communications Act of 1934	381
Limited First Amendment Status	382
The FCC	388
Jurisdiction and Powers	388
Practice and Procedure	390
Station Licensing	391
The Initial License	392
License Renewals	398
Transfer of Licenses	402
Ownership Limitations	403
Contrast: Cable Franchising	407
EEO Rules	409
Summary Points	411
Discussion Questions	412
Key Terms	413

## CHAPTER TEN

### **Electronic Media Content 414**

---

Broadcasters and Political Speech	414
Equal Opportunities Rule	416
Candidate Access	421
The Fairness Doctrine Saga	424
Children's Television	427
Commercial Limits	427
Required Programming	428
Other Broadcast Rules	429
Sponsor ID	429
Hoaxes	430
Contests	431
Indecency	432
Program Ratings and V-Chip	432
Violence Regulation?	433

Control of Cable TV	433
First Amendment Status	434
The Cable Acts	436
Access Channels	437
Must-Carry	439
Other Cable Content Rules	441
Satellite Systems	442
Summary Points	444
Discussion Questions	445
Key Terms	445

## CHAPTER ELEVEN

## **Obscenity and Indecency 446**

---

A Touchy Subject	446
History of Pornography	449
Early American Obscenity Law	450
Obscenity and the Constitution	451
The Rationale for Controls	452
The Presidential Commissions	453
Defining Obscenity	453
Prurient Interest	454
Patent Offensiveness	455
Lack of Serious Value	456
Exception: Child Pornography	459
Attacking Obscenity	460
State Statutes	460
Federal Statutes	462
The Knowledge Requirement	464
Private Possession	465
Prior Restraint	465
Curbing Nonobscene Material	467
Postal Controls	467
Local Zoning	468
Funding Conditions	471
Women's Rights	472
Campaigns Against Advertising	472
Indecency	473
The Public Airwaves	473
Cable TV	482
Telephone	483
The Internet	484
Summary Points	487
Discussion Questions	488
Key Terms	488

## CHAPTER TWELVE

**Commercial Speech    489**


---

Seller Beware?	491
Commercial Speech and the First Amendment	492
The Rise to Protection	492
The <i>Central Hudson</i> Test	494
Defining Commercial Speech	496
Ads For Disfavored Products	498
Required Disclosures	503
Deceptive Ads and the FTC	503
Authority of the FTC	504
Deception: The Basic Elements	507
Prior Substantiation	513
FTC Rules and Guides	515
FTC Enforcement Devices	519
Lanham Act Lawsuits	520
Elements of a Claim	521
Sample Cases	522
Plaintiff's Remedies	523
State Advertising Laws	524
Government Prosecution	524
Private Lawsuits	525
Federal Preemption	525
Marketing in the New Media	527
Deception on The Net	527
Spamming	528
Traffic Diversion	529
Net Neutrality	529
Consumer Privacy	530
Liability for Illegal Ads	531
Right to Refuse Advertising	531
Summary Points	532
Discussion Questions	533
Key Terms	534
 Glossary	 535
Notes	547
Case Index	559
Subject Index	561

# Preface

Communications law is emotional, contentious, and constantly evolving. It permeates modern politics and culture. It is at the heart of our time's most intriguing controversies—from corporate political influence to hidden news cameras to sexually provocative TV to liquor advertising, courtroom theatrics, music piracy, anonymous blogs, secret government documents, user-generated website content, and stealth marketing.

Communications law influences the day-to-day, nuts-and-bolts operating decisions of the mass media and their allied communications industries. At the same time, the law cuts right to the heart of our nation's most lofty constitutional ideals—and our most basic philosophical debates. Increasingly, too, the conflicts over media rights and free expression are international. Communications law helps define the nature of our democracy and our country's relations in the world.

## PURPOSE AND APPROACH

---

When I first began teaching communications law in the 1980s I found several good textbooks available—but not the right book. I envisioned a book that provided, in roughly equal doses, all three of the most important angles to a media law introduction:

1. **Intellectual:** This is the course to make an honest, scholarly, no-holds-barred inquiry into the First Amendment and the philosophical friction points over free expression. I wanted a book that would equip students to defend and debate the U.S. Constitution in a manner indicative of true leaders in our society. The text would need to discuss history, ethics, and political and legal philosophy.
2. **Structural:** What, exactly, does the field of communications law encompass? What *are* these laws? How do they complement one another? What are the rules and the key exceptions to the rules? I needed a book that provided a legally accurate overview of the diverse field of communications law.
3. **Functional:** In addition to the legal rules themselves, what should communications professionals know to help them navigate the litigious landscape? What are the common pitfalls and how do you spot them? What practical

steps can professionals take to avoid legal hassles? In a sense, the textbook should also provide enough “street wisdom” to serve as a basic first-aid kit for communicators in the field, even if that aid is simply to know when to consult a lawyer.

Ideally, I thought, the book should be written by a professor who was also a communications lawyer and who had significant professional experience producing media content. Eventually, at the urging of a colleague, Prof. Martin Sommers at Northern Arizona University, I decided to tackle the imposing task. In the years between the first edition and this sixth edition, I have appreciated encouraging and highly constructive feedback from students and professors.

This book assumes an audience of students who may be taking both their first and last course in communications law. It also assumes that many of those students anticipate working as professional communicators in such varied capacities as TV news anchors, sports editors, photojournalists, broadcast program directors, advertising account executives, marketing and promotions experts, magazine writers, government information officers, investigative reporters, video producers, website managers, and online columnists. The book focuses on legal principles that directly shape communication—laws that most influence the content and channels of expression in the United States. Rules concerning the routine business operations of the media, such as labor law and taxation, are left to courses in business law.

Communication professions today encompass increasingly varied and overlapping avenues of communication, from newspapers and magazines to broadcast and cable to websites and social networking tools. Therefore, this book covers a broad swath of the law. Treatment is most extensive on topics that have the broadest professional relevance, such as libel and copyright law, and on topics that serve best to illustrate First Amendment dilemmas. But this book does not pretend to be an exhaustive treatise on communications law nor on any one topic within that vast and complex field.

By the nature of the subject, any study of law is a formidable task. Another key aim, therefore, has been to provide a readable, user-friendly text that focuses on the most germane principles and examines the most important and interesting cases. I have sought to minimize Latin phrases and avoid truly arcane legal details. Footnotes and case names are used in moderation, compared with many legal texts.

## SPECIAL FEATURES

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To help promote learning, this edition of *Communications Law* includes the following special features:

- An engaging Hypothetical scenario at the beginning of each chapter to serve as a springboard into the discussions that follow
- A list of Learning Objectives on the first page of each chapter



- Key Terms highlighted in the narrative by boldface type, followed promptly by their definitions
- Diagrams, boxed features, sample documents, and other graphics to aid learning
- Summary Points, Discussion Questions, and a list of Key Terms at the end of each chapter
- Dozens of Quick Check boxes scattered throughout the text to serve as reminders and as basic guides to analysis
- An extensive glossary of more than 200 legal terms that are particularly relevant to communications law

## NEW TO THIS EDITION

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This sixth edition of *Communications Law* retains the chapter alignment and most of the headings from the prior edition, which was rated favorably by students and faculty reviewers. This edition has been updated in many places, however, to reflect the latest in world events—and events in the courtrooms and legislatures and government agencies of America. New content highlights in this edition include:

- The defamation and copyright issues arising from user-generated content on websites
- Recent rulings on cyber-libel and on the “libel tourism” problem
- The *Borat* cases and invasion of privacy
- The apparent demise of the Child Online Protection Act
- Important Supreme Court and Third Circuit rulings on broadcast indecency
- Student expression and the Supreme Court’s ruling in *Morse v. Frederick*
- Recent FTC enforcement efforts against misleading advertising
- New FTC guidelines for testimonials and blogging
- FCC scrutiny of sponsor-identification compliance and video news releases
- Fresh efforts to regulate violence in electronic media
- The debate over possible revival of the “fairness doctrine” for broadcasters
- Efforts to pass a federal shield law for journalists and the debate on protecting i-reporters and bloggers
- Constitutionality of the McCain-Feingold campaign reform law’s electioneering restrictions
- Access to government e-mails and cell phone records
- The precarious legal rights and liabilities pertaining to idea submission
- The new administration and continuing evolution of the FCC’s media ownership rules
- Copyright and publicity rights versus the First Amendment, and the Obama poster dispute

## CASEBOOK

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I hope this book will prove stimulating and that it will prompt a lifelong interest in the First Amendment and communications law. For students and instructors who desire a more thorough, first-hand look at judicial language and reasoning in communications law, I have prepared a casebook that may be used as a companion. *Cases in Communications Law*, also published by Wadsworth, a part of Cengage Learning, contains edited versions of more than sixty actual court opinions, arranged in the same topical order as the chapters in this text. New cases in the sixth edition pertain to such areas as student expression, corporate political speech, access to documents, broadcast indecency, “adult” bookstore zoning, ownership limits in cable TV, and attempts to shield children from “harmful” Internet content.

## ACKNOWLEDGMENTS

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I am indebted to the following experts who, at various stages, reviewed this project and provided valuable suggestions: Mike Allen, University of Wisconsin-Milwaukee; Sandra Braman, University of Alabama; Clay Calvert, Penn State University; Paul MacArthur, Sam Houston State University; George Padgett, Elon University; Michael Taylor, Henderson State University; and Kyo Ho Youm, Arizona State University. I also want to thank the reviewers of previous editions: Roy Alden Arwood, University of Idaho; Judith M. Buddenbaum, Colorado State University; Louis A. Day, Louisiana State University; Richard Goedkoop, LaSalle University; William Hanks, Wright State University; W. Wat Hopkins, Virginia Polytechnical Institute; Robert Jensen, University of Texas; Allan D. Larson, Clarion University of Pennsylvania; Seong Lee, Appalachian State University; Val E. Limburg, Washington State University; Joan Lowenstein, University of Michigan, Ann Arbor; Shannon Martin, Rutgers University; W. Robert Nowell III, California State University, Chico; Michael Ogden, University of Hawaii at Manoa; David Protes, Northwestern University; Robert D. Richards, The Pennsylvania State University; Martin Sommerness, Northern Arizona University; Sara Capri Spears, Bowling Green State University; Elizabeth K. Viall, Lamar University–Beaumont; John Vivian, Winona State University; and Ruth Walden, University of North Carolina at Chapel Hill. And lastly, I wish to acknowledge the following survey correspondents: Tom Aiello, University of Texas at Arlington; Robin Bisha, Texas Lutheran University; Chris Blair, Union University; Louis A. Day, Louisiana State University; James Dockery, University of the Incarnate Word; Sharon Ford-Dunn, Grambling State University; Dr. Andrea Frantz, Wilkes University; Charles Ganzert, Northern Michigan University; Traci Griffith, St. Michael’s College; Seok Kang, Arkansas Tech University; Dr. Craig A. Klein, Humboldt State University;

Sarah H. Ludwig, Mary Baldwin College; Stephen R. MacNamara, Florida State University; Andrew W. Markley, Grove City College; Miriam Metzger, University of California, Santa Barbara; J. Millen, Rider University; Stu Minnis, Virginia Wesleyan College; William R. Nowell III, Ph. D., North Carolina Central University; John L. Pelletier, Newbury College; Jeffrey Pierson, Bridgewater College; Matthew J. Smith, Wittenberg University; and Lara Zwarun, University of Texas at Arlington.

I also want to thank the following people at Wadsworth, a part of Cengage Learning: Michael Rosenberg (Publisher), Jill D'Urso (Assistant Editor), Erin Pass (Editorial Assistant), David Estrin (Developmental Editor), Jessica Badiner (Media Editor), Bryant Chrzan (Marketing Manager), Darlene Macanan (Marketing Coordinator), Rosemary Winfield (Content Production Editor), and Nisha Sundaram (Associate Project Manager).

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**John D. Zelezny** is a communications lawyer and a senior public relations executive. He has extensive experience in both academia and professional communications. His career began as a small-town newspaper reporter in the 1970s, later encompassed 15 years as a professor of media law and journalism at three West Coast universities, and eventually led to roles as a corporate executive and communications adviser to CEOs and boards of directors. He is a member of the State Bar of California and currently serves as senior vice president and chief communications officer for Community Medical Centers in central California. Mr. Zelezny holds degrees from Humboldt State University and the University of the Pacific, McGeorge School of Law. He maintains a First Amendment website at [www.JohnZelezny.com](http://www.JohnZelezny.com).

## CHAPTER ONE

# The U.S. Legal System



*After completing this chapter, you should*

- **Understand** why it is advantageous for communications students to study the law.
- **Know** the principal categories of American law and how to distinguish them.
- **Understand** the typical structure of court systems and the distinctions between trial and appellate courts.
- **Possess** an overall understanding of how this nation's multiple jurisdiction legal system functions and how individual disputes proceed through the courts.

## STUDYING THE LAW

---

In the United States today, the law touches almost every aspect of everyone's life. This is particularly true for those who work in mass communication. What is communicated, how it is communicated, to whom it is communicated, when and where it is communicated, and the effects of that communication all may raise important legal concerns for people throughout the communications industries.

## Hypothetical

### Threat of a Lawsuit

Assume that you were recently hired as the program director for a commercial radio station, KBIG. The station format is primarily rock 'n' roll, but several news segments are broadcast each day. The problem is, very little money is budgeted for a news staff to cover local events. In fact, news staffing amounts to a single half-time position.

Under this staffing constraint, it has been particularly difficult to produce a good, original news show to fill the morning drive-time slot. Therefore, the KBIG news reporter has increasingly relied upon the local daily newspaper as the source for news material. On this particular morning, the news reporter filled the time simply by reading—word for word—the first few sentences from several stories that appeared in the morning paper.

A few hours later you receive a phone call from an angry editor at the newspaper. The editor delivers this threat: "You're stealing our work. You know that, don't you? You're reading our stuff without permission, and that's copyright infringement. You'd better knock it off right away, because we're mad enough to sue. Got it?"

You might soon contact a lawyer in order to get a detailed opinion about your rights. But in the meantime, you can answer some basic questions for yourself. Are the newspaper editor's threats based on language in the U.S. Constitution, in a legislative enactment, or in some other body of law? If the editor is right, is this a civil violation that could cost you money or a crime that could land you in jail? If you are sued, will the case be handled by a state court or by a federal court? If the newspaper were located in a neighboring state, would it complicate the matter of court jurisdiction? Also, if the paper did decide to sue you, how would that lawsuit formally begin and what would be the sequence of procedural steps toward a resolution?

There are several reasons it is important that communications students study the law in college and maintain an interest in the law throughout their careers.

One reason is daily survival. An understanding of the law helps communicators make prudent decisions in such day-to-day tasks as interviewing news sources, filming accident scenes, writing product advertisements, selecting the music to accompany TV productions, and wording corporate news releases. Even these routine assignments may be fraught with legal hazards that professionals must know how to avoid. Sometimes it is a matter of respecting others' legal rights; sometimes it is a matter of asserting your own. Daily survival also means knowing when to seek the advice of a seasoned professional in the office or when to consult a competent communications lawyer to avoid legal hassles.

It's also important for communicators to know the law so they can talk intelligently about it, defend it, critique it, and perhaps even help mold it. Like it or not, mass communicators have by necessity assumed the role of society's primary guardians of free speech. It is not always an easy role. The public expects the media to be vigilant regarding intrusions into freedom of expression and to protest them. On the other hand, when mass communicators are perceived as irresponsible, legislators and the public are quick to clamor for tighter legal controls. Communications professionals should be equipped to debate those legal policy considerations and the ultimate virtues of free expression. And to be effective in the debate requires a sharp knowledge of the rules of defamation, privacy, indecency, access, copyright protection, and prior restraint. Communicators are partly responsible for helping people understand the relationship among media, government, and society. Much of that relationship involves law.

Yet another reason to study communications law is, simply, because it is fascinating. The law embodies America's unique history, its hottest philosophical debates, its most incendiary social issues, and its weirdest and least expected turns of events. Study of the law opens our eyes to ethics, human nature, and public policy.

In addition to these direct benefits, a valuable byproduct of legal study is the cultivation of critical thinking skills. A field as complex as communications law requires effortful thinking; memorization alone is insufficient. The study of law is an ideal vehicle through which to better distinguish philosophical arguments, analyze factual scenarios, and apply settled principles in new contexts.

Before you can successfully study a particular field of law, however, some knowledge of the legal system is necessary, and that is the focus of this chapter. A few things are worth keeping in mind right from the start: One is that laws change, literally overnight in some cases. By the time a textbook is written, edited, printed, and distributed, new laws will be passed and new court decisions announced that might deserve your special attention.

Also, circumstances change. Slightly different factual scenarios may bring drastically different legal results, and the law constantly struggles to keep up with new controversies, often deciding them on a case-by-case basis. This means that the law is necessarily riddled with gray areas where hypothetical questions cannot be answered with certainty. Students need not be frustrated by this, but hopefully will accept it as a part of the intellectual attraction of the law.

Another point to remember is that the law often differs from one place to another within the United States. This is because our nation's basic organizing principle is federalism—a union formed by separate, sovereign states. The states assigned certain specified powers to a central government, but they also reserved jurisdiction to handle a great portion of their internal affairs as they see fit. Therefore, on some subjects the laws of neighboring states may be markedly

different. The aim of this book is to convey the prevailing rules or to note the major variations regarding matters on which significant groups of states have adopted divergent policies.

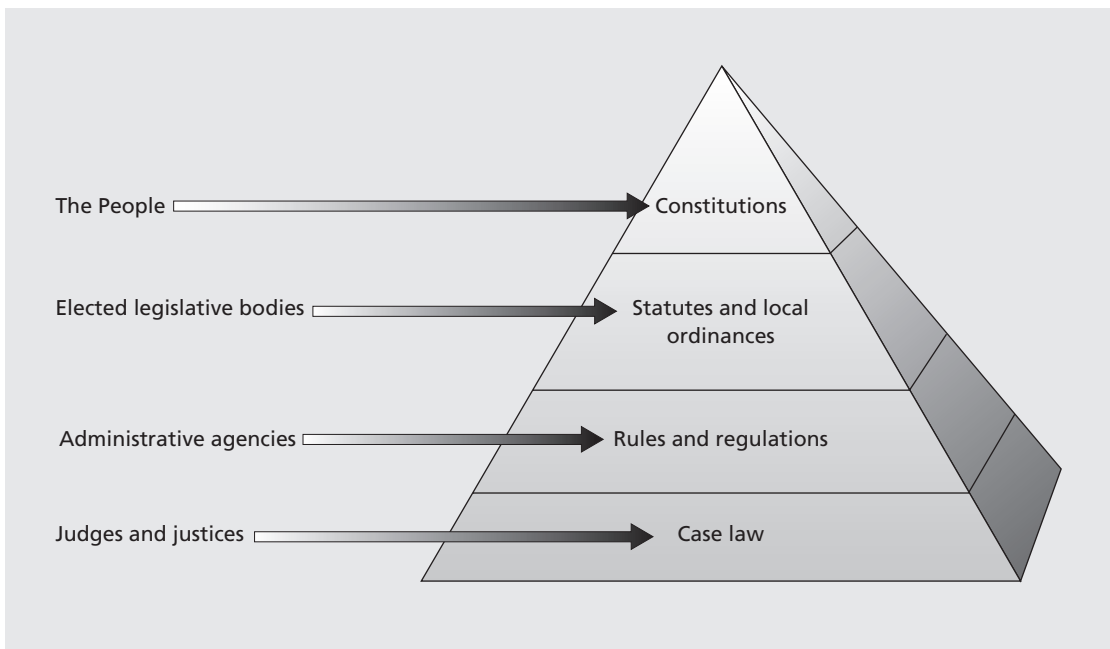
## SOURCES OF LAW

United States law is sometimes difficult to decipher because it originates from a variety of sources, among them constitutions, statutes, administrative regulations, and the common law of the courts. Which of these constitutes the law? Actually, each one is part of the whole cloth that makes up the law. It is very important to be able to categorize law according to its source, because the law from each source has different characteristics and a different position in the hierarchy of communications law. Therefore, we will consider each of these sources in some detail, in descending order of stature (see Exhibit 1.1).

### CONSTITUTIONAL LAW

The most powerful laws are constitutional in origin. A **constitution** is the most fundamental law of a particular jurisdiction. It serves as a charter for the government, specifying the government's form, functions, and operating procedures.

#### EXHIBIT 1.1 Sources of "The Law"



Typically, constitutions also blueprint the relationship between the government and the governed, guaranteeing certain basic rights to the people. In most cases constitutions can only be enacted, altered, or amended with special involvement by the people, such as by a popular vote.

### ***The U.S. Constitution***

The highest law of this nation is the U.S. Constitution. It sets out the framework of the federal government, including its division into executive, legislative, and judicial branches, and provides guidelines for the government's operation. As mentioned earlier, it also delegates to the federal government legal power over enumerated subjects and certain other kinds of legal disputes.

The U.S. Constitution also guarantees, in its first ten amendments, that certain rights and freedoms shall be retained by the people. Ratified as the **Bill of Rights** in 1791, these amendments long have served as a model for other nations and as a focal point of hope and inspiration for oppressed people in America and around the globe. This book is concerned at every turn with the First Amendment and its guarantee that Congress shall not abridge "the freedom of speech, or of the press." But this book will also examine rights under the Fourth Amendment (right against unreasonable searches and seizures) and the Sixth Amendment (right of the accused to a fair trial). In each amendment, the guaranteed rights provide protection against certain kinds of government action, but not against the actions of other private individuals.

### ***State Constitutions***

Each state has its own constitution. State constitutions are patterned to a great extent after the federal Constitution. This is because most states joined the Union after the adoption of the federal Constitution and, according to the U.S. Constitution's rules for admission of new states, the constitution of each applicant state must be approved by Congress. It seemed prudent, therefore, to include in a state constitution many of the same kinds of provisions that existed in the federal charter.

Most important for purposes of this course is that state constitutions also include free speech guarantees that are roughly equivalent to the First Amendment. Some are worded similarly to the First Amendment; others use very different language. For example, a provision in the Constitution of Arizona reads, "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

State constitutions may not restrict the minimum level of freedoms guaranteed for all U.S. residents in the federal Constitution. If it wishes, however, a state through its constitution may guarantee its citizens greater liberties than does the U.S. Constitution. For example, the California Supreme Court in 1979 held that the state constitution protects speech in privately



owned shopping centers, contrary to the U.S. Supreme Court's interpretation of the First Amendment. The U.S. Supreme Court later acknowledged that the state is free to adopt civil liberties greater than those conferred by the federal Constitution.

### ***Judicial Review***

One problem with constitutions, and particularly the U.S. Constitution, is that their precise meaning isn't always clear. When a new controversy arises, the Constitution's elegant but terse language often leaves uncertainty about whether a provision applies or is being violated. By necessity, then, some branch of government must have authority to *interpret* a constitution. In the United States, that branch is the judiciary. Under the **doctrine of judicial review**, it is the role of each court system to interpret that jurisdiction's constitution. The highest court in each jurisdiction is the final authority on the meaning of its constitution.

Therefore, the **U.S. Supreme Court** is the final authority on the meaning of the U.S. Constitution,<sup>1</sup> and the Court's interpretations must be followed by all other federal and state courts when the federal Constitution is at issue. The Supreme Court of Arizona, however, is the final authority on the meaning of the Arizona Constitution; not even the U.S. Supreme Court may interpret that document differently.

**Constitutional law**, then, means not only the raw language of the documents but also the constitutions as interpreted by the courts. Constitutional provisions, as judicially interpreted, rank at the top of the legal hierarchy. If a court finds that the law from any other source within the jurisdiction conflicts with the interpretation of the constitution, that other law will be deemed unconstitutional and invalid.

### ***Finding Constitutions***

The actual constitutions of the states and the federal government are published in many places, from pamphlets to government handbooks to specialized volumes found in law libraries. But perhaps the easiest way to locate a constitution is on the desired government's website. For example, the U.S. Constitution and the Bill of Rights are available online at the National Archives website, [www.archives.gov](http://www.archives.gov). And the North Carolina State Constitution is available on the state legislature's site, [www.ncleg.net](http://www.ncleg.net).

## **STATUTORY LAW**

When most people think of the law, they think of **statutes**. These are the laws passed by legislative bodies—the acts of Congress and the fifty state legislatures. Statutes begin as bills that are introduced and then deliberated by the legislators. After passage, the bills are formally signed into law or vetoed by the chief executives—state governors or the president.

In some fields, the law is almost entirely statutory. For example, all criminal laws in the United States are now in the form of statutes. The criminal statutes specify what sorts of conduct constitute crimes and what the penalties shall be. Another example is copyright law; all the basic rules can be found in the copyright statutes enacted by Congress.

As with constitutions, though, the courts also play a role in statutory law. Ultimately it is the courts that must interpret and apply the statutes in the context of specific disputes. **Statutory law**, then, refers to the actual language of the legislative enactments as well as to any official interpretations rendered by the courts.

### ***Finding Statutes***

In most jurisdictions, all statutes are systematically arranged by subject, numbered, indexed, and printed in bound volumes. These formal compilations, which must be updated continually, are usually called **codes**. Some legal publishers produce annotated codes that make legal research even easier. These codes list, after each statute, references to court rulings that have applied and interpreted that particular statute. The codes are available in law libraries and the legal sections of the general college libraries; they are also available through various online services.

Statutes of the federal government—passed by Congress—are arranged by subject and published in the *United States Code*, abbreviated in citations as “U.S.C.” Annotated versions of the official Code are available from private publishers. Newly enacted federal statutes, those passed since the last update of the Code, can be found first in the most recent volume of a government publication called *Statutes at Large*. This publication simply lists enacted statutes chronologically.

To research the basic laws on copyright, for example, one of your resources might be the *United States Code*. You would look up “copyrights” in the general index and then turn to the appropriate volume. There you could read the actual language of statutory sections pertaining to such subjects as copyright, infringement, and exceptions to infringement. If you were to consult an annotated version of the Code, you also would be directed to specific court decisions interpreting those statutory sections.

The federal and state governments are not the only authorities that legislate. County commissions, city councils, and similar elected bodies also pass laws that relate to their local jurisdictions. At the city and county level, though, these legislative acts are called **ordinances**. Here again, ordinances are codified, printed, and typically made available in public libraries in bound or loose-leaf volumes with indexes.

## **ADMINISTRATIVE LAW**

Though much more extensive than the provisions contained in constitutions, the enactments of elected legislative bodies still cannot possibly keep pace with all of today’s fast-moving and often highly technical dilemmas. Therefore,

legislative bodies over the years have delegated some of their lawmaking authority to administrative agencies. These agencies add to the body of law by passing **administrative regulations**.

For example, in the early 1900s the uncontrolled proliferation of radio stations in the United States caused havoc on the airwaves. Ultimately, the U.S. Congress, acting under its authority from the commerce clause of the federal Constitution, passed a licensing requirement to resolve the problem. But Congress could not possibly oversee the everyday details of the licensing process. So it created what today is the Federal Communications Commission (FCC) and authorized that agency to pass additional regulations pertaining to who may get a license and under what circumstances. And now the FCC, not Congress, is the source of the greatest volume of law concerning broadcasting.

The federal government has a plethora of such administrative agencies. Most agencies, such as the Environmental Protection Agency, are headed by a single director or secretary appointed by the President of the United States. But some agencies, set up to function more independently, are headed by a board or commission. These include such agencies as the Federal Election Commission, the Federal Trade Commission, the Securities and Exchange Commission, and the FCC. These commissions are appointed by the President, subject to Senate confirmation. Typically the terms of commission members are staggered, and bipartisan representation on the commission also may be required by statute.

The process by which federal agencies make and enforce regulations is dictated by the Administrative Procedure Act.<sup>2</sup> In general, agencies must publish notice of proposed regulations, solicit public comments on the proposed regulations, publish those comments, and then publish the final regulations. Though the Act ensures some uniformity among agencies, each to some extent has its own procedural culture for making law.

Many federal agencies have become powerful and prolific sources of law—some would say suffocating and wasteful. But agency regulations will be invalid if they (1) exceed the general scope of authority granted by Congress, (2) conflict with a specific statute passed by Congress, (3) conflict with the U.S. Constitution, or (4) are deemed “arbitrary and capricious” by a court.

State governments have created an even greater number of administrative agencies, covering many subjects not specifically reserved for the federal government. These range from college governing boards to fish and game commissions to transportation agencies, agriculture commissions, parks departments, health departments, pollution-control districts, and state lottery boards.

### ***Finding Regulations***

As with statutory law, administrative regulations currently in force are arranged systematically and then published in multivolume sets. Official regulations of all federal agencies, such as those just mentioned, are published according to topic

in a massive set called the *Code of Federal Regulations*—abbreviated “C.F.R.” in citations.

In most states, regulations of all agencies are published in comprehensive sets similar to the *Code of Federal Regulations*. These include, for example, the *California Code of Regulations* and the *Missouri Code of State Regulations*. In some other states, each agency is responsible for publishing its own, separate regulations.

## CASE LAW

Despite the escalated importance of statutory and administrative law in the modern era, case law remains the lifeblood of the U.S. legal system. Much of the law is not embodied in neat, codified provisions. Instead, our legal system has relied on the courts to create much of the law through their rulings in individual legal disputes. The term **case law** refers to the binding principles and rules that originate from these case-by-case judicial decisions. Case law may provide essential interpretation of the laws written by legislative and administrative bodies. Or judges may create original legal rules as needed to resolve disputes; this kind of case law is called **common law**.

### *Historical Development*

Our case law method has its roots in eleventh-century England and the king’s courts. The system arose as an alternative to the local ecclesiastical (church-controlled) courts that were prevalent at the time. The new system aimed to provide a uniform body of law for all of England, based on the common customs and standards of the land—hence the term *common law*. As cases were decided, principles of law were derived from them in order to guide the courts in future cases. Eventually this common law system amassed a huge body of specific legal rules, each having evolved from court decisions made on a case-by-case basis.

By the fourteenth century, however, the common law rules had become rigid and technical, and aggrieved parties sometimes found that the common law courts simply did not offer an adequate legal remedy. Therefore, yet another supplemental system of courts arose. These courts were called the **courts of equity**. An injured party who could obtain no adequate remedy under the common law rules could then approach the court of equity and ask a judge to fashion a remedy based on simple fairness.

Thus another body of court-originated law—the **law of equity**—developed alongside the common law. One of the key differences between these two systems was that common law courts resolved disputes by ordering wrongdoers to compensate injured persons with money or property. The courts of equity, in contrast, would direct persons to alter their behavior in a particular manner so as to stop harming others.

When the American colonies won their independence, England's common law rules and its laws of equity were adopted together as a two-pillared foundation for American justice. By the mid-1800s, however, most states as well as the federal system had abolished the separate equity courts in an effort to merge the two forms of case law. In most jurisdictions today, the same courts administer both common law and equitable remedies, often through a single proceeding.

One confusing consequence of this evolution is that the term *common law* today is often used in a broader sense, synonymously with *case law*. Both terms may be used to mean all judge-made law, as opposed to law created by legislative enactment.

Some areas of communications law consist almost entirely of case law development, such as the body of state law protecting individuals' reputations against attack. The legal rules were developed gradually by state judges, without the benefit of statutes, as they decided individual cases and attempted to reach fair conclusions.

### ***The Role of Precedent***

At the very core of case law development is the principle that courts are bound by their prior decisions or by the decisions of their superior courts. This is the **doctrine of precedent**. Without it, common law would be a worthless muddle of disjointed rulings. But with it, court decisions become reliable guides upon which future conduct may be based.

Under the doctrine of precedent, a prior judicial decision serves as a governing model—as precedent—for future cases arising under identical or similar facts. Generally speaking, a court *must* follow the precedent of an earlier case, unless the court considers the facts of the new case sufficiently different to warrant a different result.

The doctrine works as follows. First, an earlier judicial decision serves as a precedent only for courts in the same jurisdiction or judicial system. A Texas court decision is not a precedent for the courts of New York, and a New York decision is not a precedent that must be followed by the courts of Texas. At most, the Texas courts might look to the New York ruling as “persuasive authority.” But it is not binding precedent.

Furthermore, even within the same jurisdiction, a decision is binding precedent only for the court that handed down the original decision and for other courts lower in the judicial hierarchy. A decision of the Supreme Court of Texas is binding on all lower Texas courts and generally binding as a precedent in later cases before the Supreme Court of Texas itself. But a decision of an intermediate appellate court in Texas is not a binding precedent in the Supreme Court of that state. (Jurisdiction and court systems are discussed in greater detail later in this chapter.)

Lawyers are trained to use case precedents to construct and support their arguments on behalf of clients. Because the facts of two different cases are

never exactly the same, however, a judge can face a difficult decision as to which precedent actually controls the pending case. When the lawyers on each side cite different cases as precedent, the judge must decide which of the earlier cases is factually most similar to the case at hand.

A final word about precedent: Though the doctrine is taken very seriously by the courts, in rare instances a court will decide to overrule its own precedent and establish a new rule for the future. If this were done too often, it would jeopardize legal stability. Therefore, instead of overruling precedent, courts are more likely to sidestep an old rule by holding that the current case is factually distinguishable. But occasionally a precedent is directly overruled, or at least modified, when a court becomes convinced that its earlier decision is no longer proper. For example, in 1942 the U.S. Supreme Court ruled that commercial advertising did not qualify as protected expression under the Constitution. That precedent was followed by the Supreme Court and all other courts for more than three decades. Then, in 1976, in a case called *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court repudiated its earlier rule and declared that commercial advertising is constitutionally protected. (Chapter 12 explains why the Court changed its mind.)

### **Finding Cases**

Judges' court decisions are published chronologically, usually by jurisdiction, in extensive sets called **court reports**. More than 50,000 American judicial opinions are published each year. Thus, even when a dispute is concluded as far as the original litigants are concerned, the resulting court opinion may live on as precedent to guide the conduct of others.

In your study of communications law, you may want occasionally to look up the full text of important or interesting court opinions. This is a simple task when you have a case citation to go by. Take, for instance, the case of *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988). First in this citation is the name of the case. It reflects the names of two of the parties involved in the dispute—namely, *Hustler* magazine and Jerry Falwell. (At the trial level, the suing party's name is always listed first. On appeal, however, some appellate courts will alter the original case name so that the party seeking the appeal is listed first, regardless of who was the suing party at trial.) The name is followed by a reference to a volume, a published set of court opinions, and a page. In the citation here, the abbreviation "S. Ct." refers to the set of court reports called *Supreme Court Reporter*, so you would locate this set in your campus library or a local law library. There you would refer to the first number in the citation and pull volume 108 from the shelf. Referring to the second number, you would turn to page 876. And there it is. The (1988) refers to the year the case was decided.

It is common for the decisions of a particular court to be published by more than one publisher in different sets of court reports. Therefore, case names

sometimes are followed by **parallel citations** to two or more sets of court reports in which the opinion may be found. (The most widely used court reports for the various state and federal courts will be noted later in this chapter.)

If you wish to look up a court opinion for which your library does not carry the necessary set of court reports, you can often find the case via personal computer. Commercial databases, such as Westlaw and LexisNexis, can retrieve cases from any jurisdiction, and many court systems also make their decisions available for free via government Internet sites.

## OTHER WAYS TO CATEGORIZE LAW

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Not only may American law be categorized according to its various governmental sources; it may also be classified on the basis of its purpose, its subject matter, or its operational characteristics. Two of the most important distinctions are between civil law and criminal law and between contracts and torts.

### CIVIL LAW VERSUS CRIMINAL LAW

The distinction between civil law and criminal law is based primarily on whether the wrongdoers are held accountable to private, injured parties or to society as a whole. **Civil law** is essentially private law, the law under which harmed individuals or companies or even governments can sue other individuals, companies, or governments in order to extract some kind of legal remedy. The party claiming injury is using the court system and the civil law to obtain legal relief directly from the alleged wrongdoer. Usually the remedy sought is compensation in the form of money.

In most civil cases, the applicable burden of proof is described as “a preponderance of the evidence.” This means that the suing party, in order to win, must present evidence that outweighs by some degree that of the opposition. Under the preponderance-of-evidence standard, the evidence need not be overwhelmingly convincing, just more so than the other side’s.

Under **criminal law**, the government prosecutes accused individuals on behalf of the public at large. The immediate purpose of the prosecution is to impose punishment, not to compensate an injured party. Usually the punishment is a fine or time behind bars.

The burden of proof in criminal cases is much tougher. In order to win a conviction, the government must prove that the accused person is guilty “beyond a reasonable doubt.” In other words, the evidence of guilt must be totally convincing.

The laws protecting privacy and reputation, for example, are mainly civil. Under specified circumstances, injured people can collect monetary compensation from parties that spread degrading or deeply private information (areas

examined in Chapters 4 and 5). Also, the copyright problem presented in the Hypothetical at the beginning of this chapter would be a civil law matter because the threat was that a private company would sue you to protect its rights. On the other hand, the law of obscenity is mainly criminal. Offended individuals don't sue adult-oriented magazines on a claim of obscenity; rather, it is a government prosecutor who seeks punishment under a state's criminal law on obscenity.

## CONTRACTS VERSUS TORTS

Within the arena of civil law, another fundamental division is that between contract law and tort law. The categorization is based on the source of the rights and obligations involved.

Contract law is concerned with enforcing rights and obligations that arise when people enter voluntary agreements called contracts. **Contracts** are legally binding mutual promises to perform in a certain way under certain circumstances. They arise when one person makes a promise to another in exchange for a promise by the second person. The intent is to create certain expectations that did not exist prior to the agreement, and contract law enforces those expectations.

For example, a freelance reporter's promise to give a particular newspaper the exclusive story behind a tragedy the reporter witnessed, in exchange for the paper's promise to pay \$2,000, could form a valid contract. Courts are empowered to enforce the terms of the agreement. If one party to a contract believes the other has not performed as promised, that party may sue for monetary compensation. The formal basis for such a lawsuit is a legal claim for **breach of contract**. Contracts permeate the field of mass communication. Examples are the agreement between an advertising agency and its client, the agreement between an author and a book publishing company, and the agreement between a commercial photographer and a model.

Communications law also involves a very broad classification of law called **torts**. A tort is any other wrong—other than breach of contract—for which the law gives the injured party some kind of remedy against the wrongdoer in civil court. The rights protected by tort law do not arise by agreement. Rather, they are rights—and corresponding duties—that a jurisdiction affixes universally to human relations. As the basic principle is stated in California, "Every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations."

The law actually recognizes many different torts, each with a separate name and definition. For example, it may be a tort to publish something derogatory about a person (libel), to secretly bug someone's house with electronic devices (invasion of privacy), or to play a cruel practical joke over the radio (infliction of mental distress).



An important facet of any tort lawsuit is the applicable fault standard. That is, in addition to engaging in the harmful conduct, the alleged wrongdoer must be shown to have acted with a certain degree of dereliction. Depending on the tort, the fault requirement is usually stated as “negligence,” “gross negligence,” or “malice.” The law does recognize a few “strict liability” torts, however, wherein the alleged wrongdoer may be held accountable for his actions even if the resulting harm was in no way intended and could not reasonably have been foreseen. Historically, many states regarded libel as a strict liability tort, as Chapter 4 recounts.

In some cases the same act of wrongdoing may amount to both a tort, for which the injured party may file a civil lawsuit, and a crime, for which the government will prosecute. This is the case with some kinds of trespass, for example.

A substantial portion of communications law is simply the specialized application of general tort and contract principles that have evolved over many decades and, in some cases, centuries. Communications law, then, is not a formal, separate branch of law that developed in a vacuum. Rather, it reflects many of the legal principles and social policies that underlie American civil law in general. For example, thinking back to the chapter Hypothetical, suppose that you entered into a contract with the local newspaper by which you would be allowed to read some of its news material on the air. This contract would take the specialized form of a copyright license. But the basic principles for how that contract is formed and honored would be virtually the same as with any other kind of contract, such as a contract to provide gardening services. What makes communications law different from other fields of law is that the U.S. Constitution often intervenes and forces general legal rules to yield to a higher aim: freedom of speech. Elucidation of the influence of the Constitution begins in Chapter 2.

## COURT SYSTEMS AND JURISDICTION

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The term **jurisdiction** is one of the most important concepts in the study of law. Jurisdiction is, in fact, at the heart of law itself, because it is the authority to make and administer the law. The concept of jurisdiction implies rights, powers, and limits. A government may be empowered to make and enforce its laws through its legislature, administrative agencies, and courts, but it can legally extend its power only to the limits of its jurisdiction.

In one sense, jurisdiction refers to the power of a government to enforce its laws on a particular person or organization. This is called **personal jurisdiction**, and it is largely a territorial concept. For example, one state may pass a law requiring that police officers’ traffic accident reports be open for public inspection. But that law can be enforced only within the state’s borders. The state would have no jurisdiction to enforce its law in a neighboring state, where the rule on accident reports might be different.

In another sense, jurisdiction refers to the subject or type of dispute over which legislatures and court systems have legal authority. This is called **subject matter jurisdiction**, and it reflects an important distinction between powers assigned to the federal government and powers reserved to the states collectively.

## FEDERAL JURISDICTION

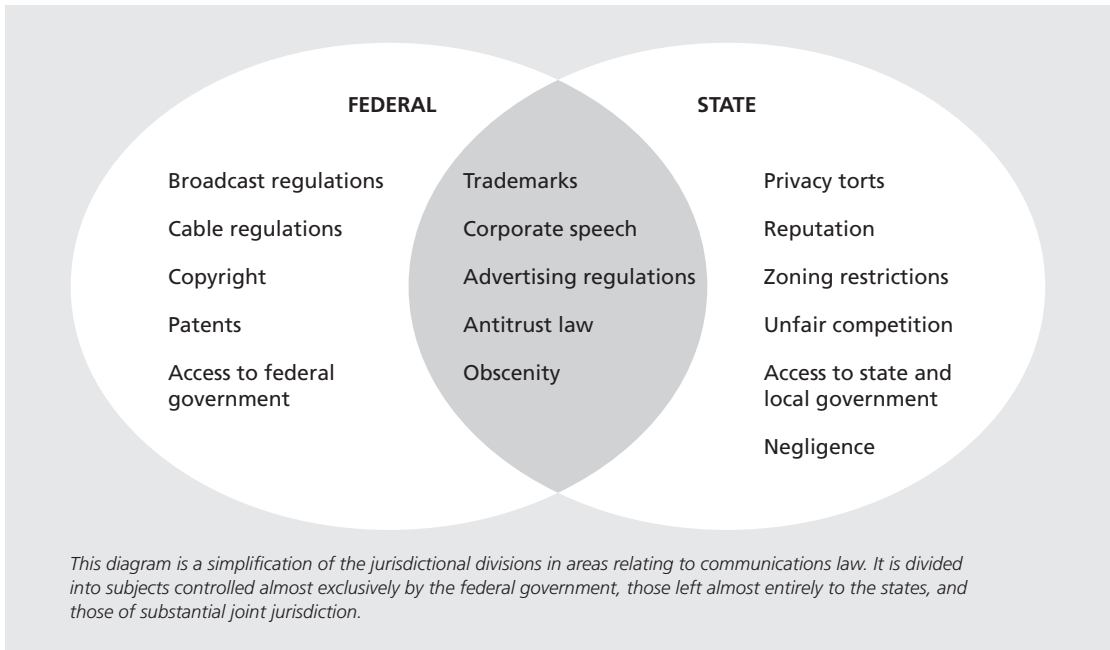
When this nation was formed more than two hundred years ago, the states that joined to create it granted certain powers to a federal government in return for the benefits a centralized government would provide. But the federal government is one of limited, enumerated powers, as outlined in the U.S. Constitution. The enumerated powers include the authority to make treaties with foreign governments, to regulate interstate commerce, to coin money, to declare war, and so on. The federal government may exercise authority only to the extent granted in the Constitution, and the Tenth Amendment of that document declares that the powers not delegated to the federal government “are reserved to the States respectively, or to the people.”

In terms of communications law, federal jurisdiction permits lawmaking in such areas as broadcasting, through Congress and the Federal Communications Commission; copyrights and trademarks, through Congress and the copyright and patent offices; and commercial advertising, through Congress and the Federal Trade Commission.

### *Exclusive versus Concurrent*

When the federal government regulates within its granted powers, it may override or preempt any state regulation on the same topic. This federal right of preemption comes from the supremacy clause in Article VI of the Constitution. For example, as a legitimate exercise of its commerce power, Congress decided to regulate broadcasting. In doing so, it also specifically preempted that field; any state laws attempting to regulate broadcasting, whether parallel to or in conflict with the federal laws, would be invalid. The same holds true for copyright regulation. In other words, not only does the federal government have jurisdiction in these fields, but it has also chosen to exercise exclusive jurisdiction.

This isn't always the case, however. Sometimes Congress allows concurrent jurisdiction by the states. For example, Congress, again acting under its commerce power, has passed laws against deceptive advertising. But in this field the federal government has made no claim of exclusive jurisdiction. Therefore, as Chapter 12 relates, both the federal government and the individual states have laws against deceptive ads. The state laws are valid unless they conflict with federal law to the extent that both cannot stand. (See Exhibit 1.2 for a diagram of federal and state areas of jurisdiction.)

**EXHIBIT 1.2** *Jurisdiction over Subjects in Communications Law***Federal Courts**

In addition to its jurisdiction over legislation in certain subject areas, the federal government exercises jurisdiction, through its courts, over certain kinds of legal disputes. Federal courts are authorized to resolve legal disputes that arise under the laws passed by Congress and federal agencies, or under the U.S. Constitution. For example, the copyright dispute in the hypothetical scenario that opened this chapter would fall under the jurisdiction of the federal courts because the underlying copyright law is a creation of Congress. Also under federal court jurisdiction would be a dispute over whether police, by confiscating a news photographer's camera, violated the photographer's fundamental right of free speech guaranteed in the First Amendment of the federal Constitution.

Federal court jurisdiction, as with federal jurisdiction generally, does not necessarily mean exclusive jurisdiction. Only in areas the federal government has decided to preempt entirely—such as copyright law—do the federal courts represent the sole forum available. For example, many communications law cases involve claims that state laws improperly conflict with federal constitutional rights. These claims can be adjudicated in federal court or in a state court.

In addition to handling disputes arising from federal law, federal courts have jurisdiction to resolve controversies between citizens of different states. These **diversity-of-citizenship** cases are very common in communications law. Their

underlying theory is that citizens of different states should have access to an impartial forum to resolve their legal disputes—even though no federal law is at issue. In diversity-of-citizenship cases, the federal courts apply state law to resolve the conflicts. Where the alleged legal violation occurred usually determines which state's law will be applied.

The federal system is composed of two kinds of courts. One is the **trial court**, where evidence is presented to determine the facts of a case and a decision is reached by applying the law to those facts. The second kind is the **appellate court**, where a panel of judges determines whether the trial court made any errors in its application of the law and whether those errors justify changing the trial decision. (This process will be explained in more detail later in this chapter.)

The main trial court in the federal system is the **U.S. District Court**. There are ninety-four U.S. district courts in all, including at least one in every state. The district courts are the workhorses of the federal court system. In fiscal year 2008, for example, some 267,000 civil cases and 71,000 criminal cases were filed in the district courts.

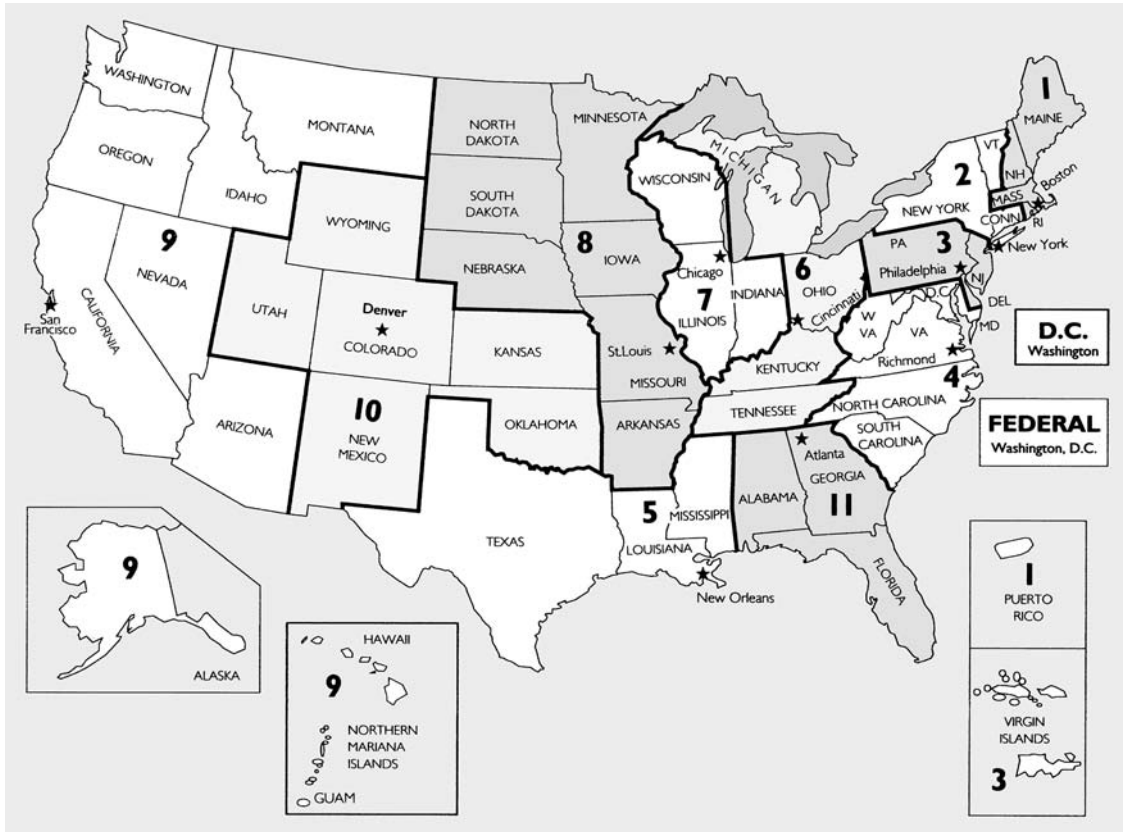
The next level, an intermediate court for hearing appeals, is the **U.S. Court of Appeals**. For appellate purposes the nation is divided into twelve regional units, called circuits, each with its own court of appeals (see Exhibit 1.3). Eleven of these are multistate circuits, and one is for Washington, D.C. A thirteenth circuit, called the **Federal Circuit**, has nationwide jurisdiction to hear appeals in certain specialized kinds of cases, including patent-law cases. In 2008 some 61,000 cases were filed in the regional courts of appeals.

Finally, at the top of the federal judicial pyramid is the Supreme Court of the United States, with its nine justices in Washington, D.C. The Supreme Court has the authority to review decisions by any of the courts of appeals and, in some cases, decisions by the highest court in each of the states' judicial systems. The Supreme Court is the final arbiter on all legal questions involving the U.S. Constitution and other federal laws. Review by the Supreme Court is discretionary and very hard to obtain. For example, in 2008 about 8,000 cases were filed with the Court, but the justices agreed to hear just 75 of those cases.

### ***The Application of Precedent***

In the federal court system, a Supreme Court decision serves as precedent for later Supreme Court cases and for cases in all other federal courts. A decision by the Court of Appeals for the Ninth Circuit is precedent for that court and for all the federal trial courts within the boundaries of the Ninth Circuit, but not for courts in the other circuits. And a decision of a trial court, a U.S. District Court, is binding precedent only for that particular district court, because it is at the bottom of the federal judicial hierarchy.

This book sometimes refers to cases of the federal Courts of Appeals as being decided by the "U.S. Court of Appeals" or the "Court of Appeals"—without specifying the circuit that issued the ruling. The circuit can be found in the

**EXHIBIT 1.3** *The Thirteen Federal Judicial Circuits*

citation for that ruling listed in the Notes at the end of the book, but the text may not differentiate among circuits unless there is a reason to do so. Keep in mind, however, that the various Courts of Appeals do have distinct personalities and may issue opinions that contradict one another. Unless and until the Supreme Court chooses to rule on the matter, the decisions of the respective circuits are binding precedent for the lower federal courts within their boundaries.

As you can see from this system, decisions by the U.S. Supreme Court are of the greatest significance, not just in terms of the individual disputes in question but because they may set precedents for courts throughout the land. This book is especially concerned with court interpretations of the First Amendment of the Constitution. When those interpretations come from the U.S. Supreme Court, they are binding precedent for all other courts, both state and federal. Appropriately, then, this book will focus on Supreme Court rulings. Some legal

issues simply have never been ruled upon by the Supreme Court, however, or even by the highest courts of the various states. Until they are, the rulings of lower courts serve as the best available authority.

For opinions of the federal courts, the following sets of court reports will be cited most frequently in this book:

- *The United States Supreme Court Reports* (abbreviated “U.S.”) and the *Supreme Court Reporter* (“S. Ct.”), both for opinions of the U.S. Supreme Court.
- *The Federal Reporter* (abbreviated “F.,” “F.2d,” or “F.3d,” depending on the series), for opinions of the U.S. Courts of Appeals.
- *The Federal Supplement* (“F. Supp.” or “F. Supp. 2d”), for opinions of the United States District Courts. (Trial-level courts generally do not issue written opinions for publication. The federal District Courts are exceptions to this rule.)

## STATE JURISDICTION

Those powers not specifically granted to the federal government are reserved by the individual, sovereign states. This means that the United States possesses not just one legal system, but fifty-one sovereign systems—one in each state, plus the federal system.

One result of this situation is that each state government has jurisdiction within its borders over those fields of law not designated by the U.S. Constitution as the domain of the federal government. Therefore, many fields of law are primarily, if not entirely, matters of state concern. The broad field of communications law, protection of individual reputations and protection of privacy, negligence laws, and zoning laws, for example, are matters traditionally within the domain of the states.

Also, because different states’ legislatures and courts may decide similar issues differently, it is common for legal rules to vary significantly from state to state. For that reason, the states often are referred to as laboratories for democracy, where legal solutions to problems can be devised, tested, and ultimately adopted, modified, or rejected by other states and the federal government.

The concept of sovereign states with their own realms of legal jurisdiction is deeply rooted in the language and structure of the U.S. Constitution and even in American legal principles that predate the Constitution. The strength of state sovereignty was boldly reaffirmed by the U.S. Supreme Court in 1999 when it ruled that Congress generally lacks the authority to authorize private persons or corporations to sue the states.

For example, although the federal government has enacted an unfair-advertising law authorizing one individual to sue another or to sue a business, the law cannot be used to haul a state agency into court—unless the state itself agrees to waive its sovereign immunity from such lawsuits.<sup>3</sup> An outgrowth of the notion

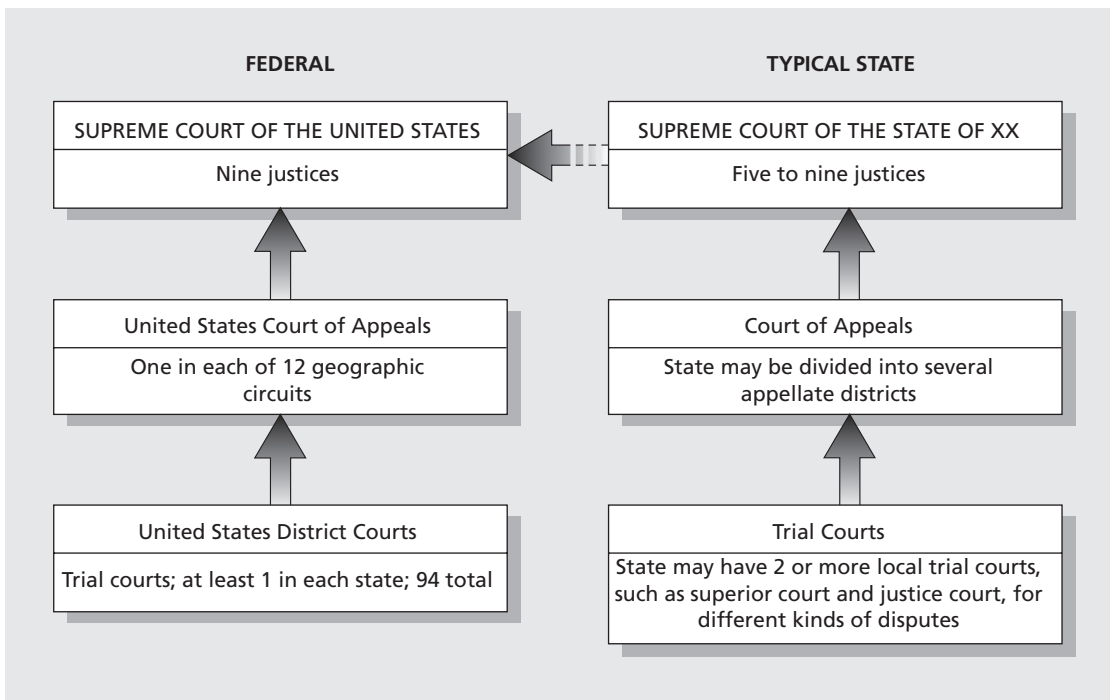
of sovereign, politically autonomous states, the doctrine of **sovereign immunity** is that the state cannot be sued in federal court, even under authority of a federal statute, unless the state consents.

### State Courts

Each of these sovereign states also has its own court system. As in the federal judicial system, state court systems consist of both trial and appellate courts. The trial courts go by many different names, including justice court, municipal court, superior court, circuit court, county court, and court of common pleas. Most states have intermediate courts of appeal, and each state has one court at the top of its hierarchy, usually referred to as that state's supreme court. (A diagram of the federal court system and a typical state system appears in Exhibit 1.4.)

In most states there is an official set of reports dedicated to publishing the decisions of that state's courts. Often these court reports are hard to find in libraries, however. So in this book you will often see state court decisions cited to the more popular *National Reporter System*. Published by West Publishing Company, it is a collection of the case opinions from state courts, organized into

**EXHIBIT 1.4** Court Systems



seven regional sets of reports—the *Atlantic Reporter*, *North Eastern Reporter*, *Pacific Reporter*, and so on.

Determining the proper court system for a legal dispute can be a tremendously complicated matter in the United States, and it is up to the aggrieved person to select a court of proper jurisdiction when initiating a lawsuit. One consideration, as explained above, is that of subject matter jurisdiction between the state and federal courts. Yet another consideration is that of personal jurisdiction among the various states' courts. Particularly in a field such as communications law, where disputes arise from communications dispersed across state lines, it may be that any one of several court systems would have jurisdiction over the individual parties to a lawsuit. Over the past decade, disputes involving e-mail and the Internet have posed special challenges to the principles of personal jurisdiction.

## **SPECIAL PROBLEM: CYBERSPACE**

One of the most exciting features of the Internet is its international, border-defying scope. With the simple click of a mouse, users can dart from websites in the United States to sites in Asia or South America, and e-mail messages can be sent at the speed of light to a neighboring state or a distant continent. Furthermore, even when an Internet communication is strictly domestic (say, from Baltimore to Denver), the Internet connection may run through computers in Canada or Mexico. This borderless nature of the Internet has raised significant questions about when it's fair for courts to claim personal jurisdiction over the parties in cyberspace-related legal disputes.

As will be discussed periodically in this book, mass communicators often expose themselves to the possibility of legal proceedings in numerous, distant jurisdictions. For example, a Pennsylvania company that launches a national advertising campaign risks being pulled into court in Texas or California if it violates those states' false advertising laws. For traditional mass communicators, the amount of multiple-jurisdiction legal exposure is fairly easy to anticipate, however. An advertiser or newspaper that limits its distribution to three neighboring states, for example, would expect it might be hauled into court in those states, but only those states.

The Internet is quite different. Once that same Pennsylvania company connects to the Internet, its advertising generally becomes available to any Internet user, anywhere on the globe. Though technology may allow some service providers to distribute more selectively, most Internet providers still have little control over who will access their services, and where. Does this mean the online communicator is subject to lawsuits in every state and nation around the world? And what about the individual Internet users who post messages on interactive sites? Are they potentially subject to the jurisdiction of every sovereign



on the globe? The answers are rooted in fundamental principles of interstate and international jurisdiction.

### ***Interstate Jurisdiction***

A court cannot decide a case unless it has personal jurisdiction over the parties, whether they be individuals or corporations. Furthermore, a federal or state court cannot simply claim jurisdiction over any parties it wishes, because personal jurisdiction is limited by a constitutional principle that requires fundamental fairness in all legal proceedings. Within the United States, this fairness principle is often tested when a court in one state attempts to exert its authority over a defendant who resides in another state. Having to defend a lawsuit in another state can be a far more expensive, inconvenient, and possibly hostile proposition than defending in one's home jurisdiction.

The basic rule articulated by the nation's highest court is this: A court may exercise personal jurisdiction over a party who is physically present in the state in which the court sits or who has initiated sufficient "minimum contacts" with persons in that state. These contacts must be such that the party "should reasonably anticipate being haled into court" in that state.<sup>4</sup> The rule applies not only to state courts, but also to the federal district courts located in each state.

This minimum-contacts test for personal jurisdiction is easily satisfied when an individual actually resides in the state, when a business is incorporated in the state, or when a defendant maintains significant property in the state. But jurisdiction can also be based on less formal contacts, and the contacts need not be physical. As the U.S. Supreme Court has explained:

Although a territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.<sup>5</sup>

On the other hand, courts have also held that the mere act of making a phone call or sending a fax message or other electronic communication to a state is not sufficient grounds, by itself, for personal jurisdiction in that state.<sup>6</sup>

In cyberspace, then, aggressive information services—those that deliberately spread advertising and marketing campaigns nationwide and maintain subscribers in every state—should assume they will be subject to jurisdiction throughout the country. These services have "purposefully directed" significant commercial activity into each state. But a contrary rule usually applies to small, locally oriented Internet information services that are only passively available in other

states. Similarly, individual users whose electronic postings may, only by mere happenstance, be viewed by net browsers in another state should not be subject to court jurisdiction in that state.

Though courts in some early Internet cases asserted jurisdiction solely because a passive website was accessible in the state, most courts now require some kind of more purposive, deliberate communication aimed at residents of the state. A couple of cases will illustrate.

Cybersell, Inc., a Florida corporation, was formed by a business school student and his professor father to provide web consulting services. On its own website, the business featured a “Cybersell” logo over a depiction of the planet Earth and a caption that read “Professional Services for the World Wide Web.” The site invited potential customers to send an e-mail requesting further information.

Meanwhile, another company, also called Cybersell, had begun doing business in Arizona and had obtained a federal service mark registration for “Cybersell.” Cybersell AZ eventually filed an infringement complaint against Cybersell FL in federal District Court in Arizona. In 1997, the federal Court of Appeals held that Cybersell FL could not be hauled into court nearly 2,000 miles away in Arizona because the company had not purposefully availed itself of the privilege of conducting business activities in Arizona. The court noted that Cybersell FL’s website was mainly “a passive home page” and did not specifically and actively seek to sign up Arizona residents as customers. Nor was it possible actually to sign on as a customer through the website.<sup>7</sup>

More aggressive or interactive websites are at greater risk of multiple-state jurisdiction, however, and courts may look to evidence of significant site traffic or dealings with residents of the state in question. In one case, a California cyber-journalist named Matt Drudge had posted defamatory remark on his website. The subject of the remark, presidential adviser Sidney Blumenthal, sued Drudge on the other side of the continent, in federal District Court in Washington, D.C. The court ruled that it did have personal jurisdiction over Drudge because he regularly distributed his *Drudge Report* online to residents of Washington, D.C., frequently e-mailed and received e-mail from D.C. residents, solicited funds in D.C., and specifically solicited news items from D.C. residents.<sup>8</sup>

### ***International Jurisdiction***

The complexities of interstate jurisdiction are minor compared to the issues of jurisdiction on a global scale. Here again, the rise in Internet information sites and cyber-commerce has raised special challenges and concerns, particularly for U.S. Internet publishers, who face the prospect of defending charges in countries where the law may be substantially less favorable to communicators. It is beyond the scope of this book to look at the jurisdiction rules of nearly 200 nations’ tribunals. However, following are a few key principles to know about international law and jurisdiction.

First, there is no global legal authority. Each nation is an independent, sovereign entity that is free to make its own law and interpret and enforce that law as it sees fit. It's true that two or more nations may form a treaty or international compact regarding matters of defense, trade, business, or law. One of these is the Berne Convention treaty on copyrights, discussed in Chapter 8. It's also true that adjoining nations in some parts of the globe have banded together to form economic unions with a set of common rules to govern trade. The European Union and the North American Free Trade Agreement are examples. Further, it's true that the United Nations set up an International Court of Justice to resolve business disputes. But participation in all of these is voluntary and, when push comes to shove, there is no international authority that can dictate what laws a nation adopts.

Second, just as other nations' laws may differ drastically on such matters as defamation, privacy, and pornography, each nation is also free to set its own jurisdictional rules. Other nations may claim jurisdiction over a U.S. Internet service, for example, even without the "minimum contacts" required in the United States.

But third, no matter what another nation's jurisdictional rules are, a more practical issue in many instances is whether a U.S. communicator need worry about lawsuits filed against it in other countries. Unless the communicator owns significant assets in the foreign country or resides there, the foreign court may have little or no leverage to enforce a judgment against the defendant. In that case, foreign officials must seek cooperation from the U.S. justice system; they must request that a U.S. court enforce the foreign judgment. U.S. courts may refuse to enforce foreign judgments, however, if they were based on legal standards inconsistent with those in the United States. The authority of a sovereign nation and its court system generally ends at its borders.

A case will illustrate: The U.S. Internet service provider known as Yahoo! was sued in France by two French organizations dedicated to combating anti-Semitism. At issue was the Yahoo! auction site, accessible around the world, upon which various sellers had posted Nazi- and Third Reich-related goods and memorabilia. French criminal law prohibits the exhibition of Nazi propaganda and artifacts for sale. The French court therefore ordered Yahoo! to eliminate French citizens' access to any material on the Yahoo.com auction site that offers Nazi artifacts for sale. For each day that Yahoo! failed to comply with the order, it would be fined 100,000 francs.

Yahoo! argued that it could not technologically comply with the order without banning Nazi-related items from Yahoo.com altogether. Yahoo! further contended that enforcing such a ban would amount to infringement upon Yahoo!'s First Amendment rights of free expression. Accordingly, Yahoo! filed its own lawsuit in 2001, this time in a federal District Court in California, seeking a ruling that the French court's order was not enforceable in the United States,

against a U.S. company. The court agreed, issuing an order in favor of Yahoo! that read in part:

[T]he instant case presents novel and important issues arising from the global reach of the Internet. . . . What is at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case. . . . This Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States.<sup>9</sup>

The law of jurisdiction in nations around the globe, as applied to the Internet, is still evolving, with still relatively few statutes or reported cases in such major economies as Australia, Japan, and Brazil. But any U.S. news or entertainment company that invests in reaching foreign markets via the Internet should anticipate having to defend lawsuits in those jurisdictions. For example, Australian mining magnate Joseph Gutnick sued Dow Jones & Co. in Australia, claiming he was defamed by an article in the company's *Barron's* magazine that was posted on the company's *Wall Street Journal* website. Dow Jones argued that it should not be forced to defend in the Australian courts because the article was published for a domestic audience in the United States. But in 2002 the High Court of Australia ruled that Dow Jones could be sued for libel in that nation's judicial system. The court noted that Dow Jones sought and maintained some 1,700 paid website subscribers in Australia and that the plaintiff's reputational injury occurred in that country.<sup>10</sup> In 2004 Dow Jones settled the case by paying a sum to Gutnick.

## THE JUDICIAL PROCESS

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So far this examination of the legal system has focused primarily on the origins and characteristics of substantive law—the actual rules of conduct people must live by. In any given legal dispute, however, the substantive rules of law may only begin to foretell the ultimate outcome. Equally important in the U.S. legal system are the procedural aspects of law. Procedural rules may determine when and how the substantive rules are applied or even if they will be applied.

### JUSTICIABLE CONTROVERSY

The threshold principle of legal procedures is that courts can issue rulings only in conjunction with real controversies that are before them. No matter how much a judge may want to solve a problem in society, the judge cannot address that issue

unless it is brought before the court, in the form of a lawsuit, by parties who have a true stake in the outcome. This is because the courts of this country operate in an adversary system. They are empowered only to resolve specific legal disputes between the people or entities whose legal rights are in jeopardy and who have formally asked the court, by filing a lawsuit, to intervene. In legal parlance, it is said that courts will consider only a **justiciable controversy**, as opposed to a question that is hypothetical or moot.

This principle explains why case law may take a long time to develop. Lawsuits are the necessary vehicle for case law, but a legal issue may arise in society long before an actual lawsuit on that issue works its way to the courts.

## PRETRIAL PROCEDURE

Many of the critical steps in a legal dispute occur prior to trial. In this phase of the dispute, vast differences exist between civil cases and criminal cases, so they are examined separately. What follows is a description of fairly typical procedure, but some steps and terminology vary from state to state.

### *In Civil Cases*

To continue with the hypothetical problem that began this chapter, suppose your station is indeed sued for copyright infringement by the owner of the newspaper. That person begins a civil case by filing at the trial court a legal document called a **complaint**. The complaint spells out the applicable law, identifies the wrongful conduct and those allegedly responsible for it, and asks for a certain amount of compensation for the harm done. The person complaining—in this case, the newspaper owner—is called the **plaintiff**.

A copy of the complaint is then delivered to you, the defendant. A **defendant** is one against whom relief is being sought. There may be other defendants in this case, ranging from the individual news reporter to the corporation that owns the station. (Plaintiffs and defendants together are referred to as **litigants**.) You are required to file with the court an official response, known as an **answer**. In it your attorney will admit or deny each of the plaintiff's allegations and state, in general terms, why the plaintiff is not entitled to win against you.

After these initial documents, called the **pleadings**, are filed with the court, the lawsuit enters a phase called **discovery**. Unlike many of the dramatic depictions on film and television, in civil cases it is rare indeed for devastating testimony or a piece of evidence to be produced by surprise during trial. Instead, each lawyer knows ahead of time exactly what evidence the other side will present during trial. This is learned during the discovery process, through which attorneys can compel plaintiffs, defendants, or potential witnesses to answer detailed questions or hand over relevant documents. The discovery process can be time-consuming and expensive. The theory behind it, though, is to narrow the key issues prior to a full-blown trial.

As information becomes known, either side may make a variety of pretrial **motions**, which are simply formal requests that the judge make some kind of ruling in favor of the applicant. The most important is the motion for **summary judgment**, because it seeks to end the case altogether. This motion is made when the applicant believes there is no contested issue of fact and that the applicant is entitled to an immediate legal judgment in his favor. Summary judgment motions have been used extensively by media defendants to cut frivolous lawsuits short.

If such motions are denied, a trial date will be set. Very few lawsuits make it that far, however; more than 90 percent of all civil cases end with a settlement prior to trial. Often the trial judges encourage parties to settle. In a **settlement**, each side compromises and gives up something. Though the result is rarely ideal for either party, a settlement avoids the time, expense, and uncertainty of a jury trial. It is also common for the parties to agree that terms of their settlement shall not be made public.

### ***In Criminal Cases***

In criminal cases—those prosecuted by the government to obtain punishment—the pretrial procedure is significantly different from that in civil cases. It involves a greater number of formal steps along the way, due primarily to the need to safeguard the specific constitutional rights of an accused. Those rights include, for example, the right to notice of charges, the right to legal counsel, the right to a jury trial, the right not to testify against oneself, and the right to be presumed innocent until proven guilty beyond a reasonable doubt. The rights of a criminal defendant are more elaborate than those of civil defendants because, in a criminal prosecution, the defendant's liberty may be at stake.

Typically, the criminal case begins with an arrest by police, who then take their information about the suspect to the government prosecutor. A criminal complaint is promptly filed and, within a few days, the defendant appears in court for an **arraignment**, where defendants are advised of the charges against them and then asked to plead either guilty or not guilty to each charge. (In federal cases, this is called the **initial appearance**.)

Presuming the defendant pleads not guilty, the next formal step may be a **preliminary hearing**. The purpose of this hearing is to determine whether the government truly has enough evidence against the defendant to warrant a trial. During the hearing, the defendant is confronted with an abbreviated version of the prosecution's evidence. The defendant's lawyer may question the government's witnesses to discover the nature and credibility of their potential testimony at trial, but the defense does not present its own evidence at this stage. If the judge is convinced that the evidence reasonably implicates the defendant, a trial will be ordered. (In some jurisdictions, including federal, this independent assessment of the evidence is more often made by a grand jury than by preliminary hearing. In such cases, the **grand jury** issues an **indictment**—the formal charge upon which the defendant will go to trial.)

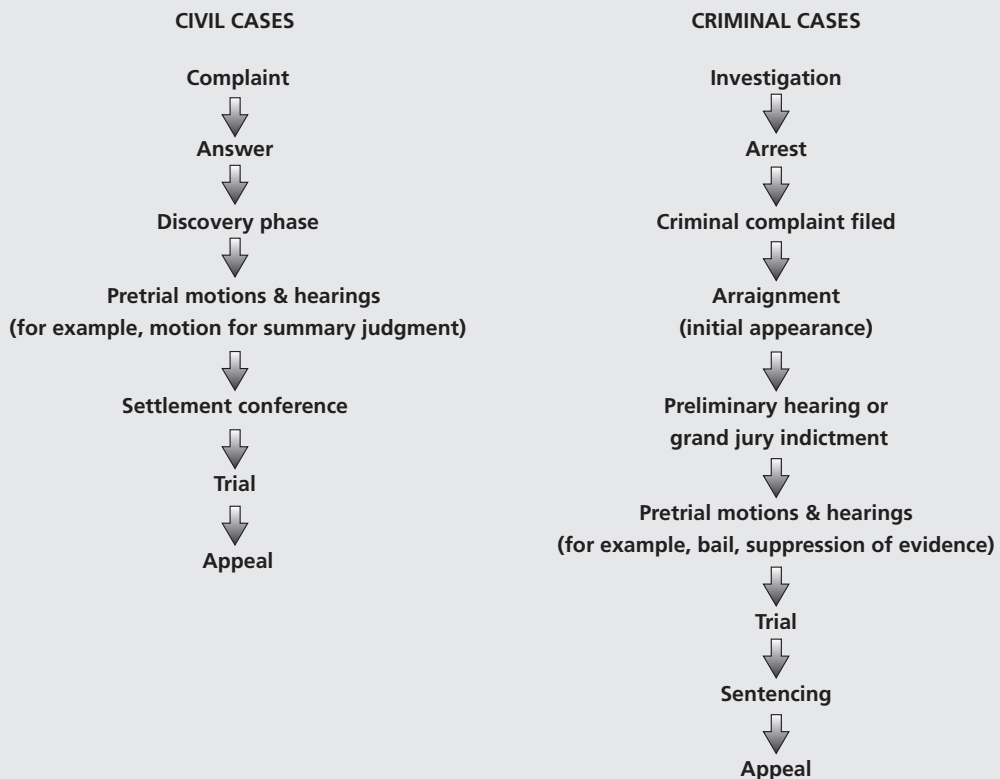
As with civil cases, a number of motions may be filed with the court before a criminal trial begins. A common one, for example, is the **motion to suppress**, which seeks to prohibit the introduction of any evidence that police may have obtained illegally. The merits of this request are debated at a pretrial suppression hearing. (An overview of the sequence of events discussed so far is presented in Exhibit 1.5.)

## TRIAL PROCEDURE

Whether criminal or civil, cases that go all the way to trial are expensive. The costs escalate even more if a jury trial is requested, because it takes additional time to select and instruct a jury.

In the ordinary trial, either criminal or civil, each side makes opening remarks. Then each side, starting with the plaintiff or prosecutor, presents its case by

### EXHIBIT 1.5 Major Steps in Legal Procedure



*This diagram gives a simplified view of litigation procedure. Procedures vary among jurisdictions, particularly on the criminal side.*

calling witnesses, who are asked questions on the witness stand by the attorneys. Participants in a trial, including the plaintiff and defendant, may find themselves repeatedly and rigorously questioned about the events in controversy. Many have found it to be a grueling experience. Finally, each side makes closing arguments and the court comes to a decision.

In jury trials, it is the jury's responsibility to decide factual questions in controversy. For example, did your news broadcast actually harm the plaintiff? How badly? Was your version substantially similar to the copyrighted version? In jury trials, it is the judge's role to rule on disputed questions of law. Should the testimony be declared irrelevant and therefore inadmissible to the jury? What degree of fault is the plaintiff legally required to prove? In proceedings where there is no jury, the judge decides both the legal and factual questions. In an effort to save time and costs, or perhaps for strategic reasons, it is fairly common for litigants to opt for a trial without a jury.

If the plaintiff wins in a civil trial, the defendant will be required to provide a legal remedy for the harm inflicted. In most cases, the remedy is a sum of money. These money awards to the plaintiff are called **damages**. Payment of damages is the traditional remedy in both contract and tort cases, even when the harm to the plaintiff was not actually monetary in nature. For example, in awarding damages a jury may be asked to place a monetary value on the wrongful loss of a plaintiff's personal privacy.

For some kinds of harm, though, the payment of damages would be an entirely unsatisfactory remedy. Instead, a plaintiff may want the court to order the defendant to do something or refrain from doing something. For example, the plaintiff might desire an official order that a TV camera crew stop camping out in the plaintiff's front yard. This kind of court order, called an **injunction**, is the most frequently used and important of the so-called equitable remedies, developed by the courts of equity that once operated as an alternative system. As a vestige of that once-distinct system, juries have no role in awarding equitable remedies; judges alone determine whether an injunction shall be issued.

## APPELLATE PROCEDURE

After the final judgment at trial, either the defendant or the plaintiff may wish to appeal. The losing party often wishes to do so. But sometimes the winning party may wish to appeal if, for example, the amount of damages awarded was smaller than requested. The appealing party is referred to as the **appellant** and the party against whom the appeal is filed is called the **respondent**, or sometimes the **appellee**.

Despite the common belief that appeals courts conduct the trial all over again, nothing is further from the truth. The factual questions in dispute were decided by the jury or judge in the trial court. And with very few exceptions, such as in prosecutions for obscenity, the appellate court will not reconsider the factual determinations. The appellate court will not view the witnesses giving testimony and will not reexamine the evidence firsthand. Instead, the job of the appellate



court is to decide whether the trial court made an error in determining or applying the law. The appellate decision is based on a transcript of the trial, a written legal analysis or **legal brief** prepared by each attorney, and a short oral argument before the court by a lawyer from each side.

If the appellate court concludes that no significant errors were made by the trial court, its judgment will be **affirmed**. If the appellate court finds that the trial was not conducted in sufficient accord with the law, the trial judgment will be **reversed**. When the court reverses, a new trial may be necessary. In that event, the case is **remanded**, or sent back down, to the trial court.

In the first-level appellate courts, in both the federal and state systems, cases are usually decided by a panel of three judges. Usually they are not the only judges for that appellate court; rather, they are the three assigned to the case. If parties are dissatisfied with the decision of a three-judge panel, sometimes they may obtain further review by the court's entire bank of judges. After a ruling by this first appellate court, most systems offer one more level of appeal. In most states, this final level is called the supreme court of that particular jurisdiction, and usually cases before the highest court are decided by the entire bench of five to nine justices. The highest court of a particular jurisdiction usually is the end of the line for the parties in a lawsuit. However, in some cases a decision of a state supreme court may be reviewed yet again by the U.S. Supreme Court. This final jump from a state high court to the federal high court is possible when the case involves a question of federal law, such as a claim that First Amendment rights have been violated.

Review by the highest appellate courts of a jurisdiction is usually discretionary. So, in most kinds of cases there is no automatic right to appeal to the highest courts. Instead, these courts accept for review those cases that present the most important or most novel legal questions. When the U.S. Supreme Court decides to review a case, it usually does so through a formal order called a writ of **certiorari**. You will sometimes hear this referred to as a "granting cert."

When an appellate court judgment is announced, it is usually accompanied by a majority opinion that indicates why the court affirmed or reversed the lower court. A **majority opinion** represents the views of a majority of the judges who considered the appeal. Judges sometimes write **concurring opinions** when they agree with the majority's final disposition of this case, but not with all of the majority's reasoning. Finally, appellate judges may issue **dissenting opinions** when they disagree altogether with the majority's ruling on a case. Although they do not represent the controlling view of the court, concurring and dissenting opinions may add valuable perspectives to the issues at hand. Also, the views expressed in a concurring or dissenting opinion sometimes eventually gain the adherence of a majority of the court.

Appellate courts' majority opinions are the most important, of course, because of their strong value as precedent. But occasionally a court cannot muster a majority opinion, in which case a plurality opinion serves as a weaker substitute. A **plurality**

**opinion** is an appellate opinion without enough judges' votes to constitute a majority but with more votes than any other opinion filed in the case. For example, suppose the U.S. Supreme Court voted 7–2 to uphold a federal restriction on liquor advertising. The seven justices would represent a clear majority supporting the Court's final judgment. However, if four of these justices reached their decision based on one rationale and three justices on another, the Court would be left without a majority agreeing to any one opinion. In this case, the Court's lead opinion would be a plurality opinion representing just four of nine justices.

## ADMINISTRATIVE PROCEEDINGS

In some specialized kinds of legal controversies between individuals and the government, legal proceedings may not actually begin in a trial court. Instead, the starting place may be an administrative hearing. Earlier, this chapter described the rule-making power possessed by many administrative agencies. In some cases, these same agencies are also authorized to issue rulings in specific controversies.

For example, suppose you are a broadcaster, and the FCC, after receiving numerous complaints about your using dirty words on the air, has decided to pull your license. You would receive notice of this decision. Your first forum in which to challenge the action would be an administrative hearing arranged by the FCC. You may be represented by an attorney, but there are no juries. Your arguments would be presented to an administrative law judge or perhaps to the full commission, and then a decision would be reached.

If you disagreed with the result of the administrative adjudication, you would have the right to take your legal argument to the regular court system. In the case of FCC rulings, your next step would be to bypass the trial court and appeal directly to the U.S. Court of Appeals. A similar process also applies in the states, where these quasi-judicial rulings of state administrative agencies are subject to review by a state appellate court.

## Summary Points

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**As a result of the American concept of federalism**, the United States is composed of fifty-one sovereign legal systems, each with its own legislature and court system.

**Some fields of law** are exclusively the domain of the federal government, some areas of law are reserved for the states, and in some cases the states and the federal government exercise concurrent jurisdiction.

**The Internet is raising many questions** about courts' personal jurisdiction over parties to a lawsuit, both internationally and between the states.

**The U.S. Constitution is the single highest-ranking source of law** in the United States. No other law may conflict with the Constitution as it is interpreted by the U.S. Supreme Court.

**Within each legal system's hierarchy of law**, constitutions are followed by statutes and then by administrative regulations. State law of any kind will be invalid, however, if it conflicts with any valid federal law.

**Court decisions are an important source** of communications law. Although court opinions are not neatly codified, they provide legal guidance by virtue of the doctrine of precedent.

**Court opinions can be located easily** by use of a citation, which includes the case name, the abbreviation for a particular set of court reports, the volume, the page number, and the year the decision was reached.

**Court proceedings are either civil or criminal.** Sometimes separate civil and criminal proceedings may result from the same incident of misconduct.

**Some specialized kinds of legal disputes** must be adjudicated first before a government agency rather than a court. Such is the case with broadcast licensing disputes, which are heard by the FCC.

**In the chapter Hypothetical**, several questions were presented about a threat to sue for copyright infringement. Copyright law will be discussed in Chapter 8, but from the information presented in this chapter the following is apparent: If the newspaper sued you for infringement, it would be a civil case, not criminal. You would be in danger of losing money but not of going to jail. The lawsuit would begin when the newspaper, the plaintiff, filed a formal complaint in the court of proper jurisdiction. That court would be a federal District Court, because the federal government has exclusive jurisdiction in the area of copyrights.

## Discussion Questions

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1. Our nation's justice system is frequently portrayed in dramatic motion pictures and on television—but not always accurately. From reading this chapter, what do you think are the biggest misconceptions that Americans have about how their courts and legislative bodies work?
2. One of the continuing debates in our republic is states' rights versus federal authority. The federal government now legislates in many areas that originally belonged only to the states, including cable TV, deceptive advertising practices, and obscenity. Do you think the proper balance has been struck? In the various fields of communications law, what are the advantages and disadvantages of the federal government taking charge and preempting the states?

3. Considering the growing importance of the Internet and its very international nature, do you think the world's nations should work to establish greater uniformity in their communication laws? What would be the advantages of greater global uniformity in such areas as defamation, privacy, and "spyware" and "spam" controls? Practically speaking, what are the biggest roadblocks to greater legal uniformity among nations?

## Key Terms

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administrative regulations	indictment
affirm	initial appearance
answer	injunction
appellant	jurisdiction
appellate court	justiciable controversy
appellee	law of equity
arraignment	litigant
Bill of Rights	majority opinion
breach of contract	motion
case law	motion to suppress
certiorari	ordinances
civil law	parallel citations
codes	personal jurisdiction
common law	plaintiff
complaint	pleadings
concurring opinion	plurality opinion
constitution	preliminary hearing
constitutional law	remand
contract	respondent
court reports	reverse
courts of equity	settlement
criminal law	sovereign legal brief statutes
damages	statutory law
defendant	subject matter jurisdiction
discovery	summary judgment
dissenting opinion	torts
diversity of citizenship	trial court
doctrine of judicial review	U.S. Court of Appeals
doctrine of precedent	U.S. District Court
Federal Circuit	U.S. Supreme Court
grand jury	

## CHAPTER TWO

# The First Amendment



*After completing this chapter, you should*

- **Appreciate** the philosophical underpinnings of the First Amendment to the U.S. Constitution.
- **Know** what the First Amendment actually says and how the words have been interpreted by the Supreme Court.
- **Understand** the general scope of First Amendment protection and the distinction between *expression* and *conduct*.
- **Know** the standards and doctrines used by courts to decide First Amendment cases.
- **Appreciate** some of the general circumstances in which freedom of speech may be limited by other, conflicting interests.

## BACKGROUND: A SHORT HISTORY OF FREE SPEECH

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Throughout human history, events have shown that freedom of expression stirs fear and anger, both within the citizenry and in government. Whether it is a rap music group recording provocative lyrics, a talk show host exploring unorthodox

## Hypothetical

### Resisting the Code of Conduct

Assume you are editor of the *Daily Drumbeat*, the student newspaper at a public college. The paper is known for being somewhat abrasive, and the college has seen recent incidents of uncivil student conduct. The campus administration has just adopted a student “code of conduct” intended to better ensure a dignified and supportive environment at the college. The code bans public profanity, as well as “language intended to ridicule, demean, or insult another member of the campus community based on ethnic background, gender, religion, or other personal characteristics.”

Though you understand the college’s desire for a congenial environment, you’re angered by the administration’s paternalistic approach, and you and other members of the *Drumbeat* staff think the new rules go way too far. You write an editorial that’s critical of the policy-making process, the conduct code itself, and the college president, and run it in the next day’s paper. You also blog about it on your personal website. Your blog post is even harsher than the editorial, employing several profane terms in your assessment of campus speech codes.

Trouble follows. A *Drumbeat* staff member took a bundle of papers to replenish a newsrack on a street corner across from campus. But while attempting to load the newsrack, the student was approached by an irate neighborhood business owner who asked, “You a part of that paper?” The student nodded, and the businessman said, “You have no class. You’re just a bunch of anarchists. But you won’t be distributing those around here any more.” The businessman pulled the stack of papers from the student and made off with them, scattering the papers into a dumpster.

Next came the college president’s visit to your *Drumbeat* office. She said she didn’t appreciate your editorial, and she was alerted to your blog, which she liked even less. Then she said, “Here’s the situation: First we have every right to enforce a code of appropriate conduct for this college. You’re an example of why that’s needed. Second, remember that the *Drumbeat* is funded by tax dollars. There will be no more attacks on me or the conduct code—or I’ll shut you down. And third, your blog violates the new code. Take it down, or I’ll start a disciplinary proceeding.”

As you’re pondering the president’s words, you learn that the city manager has just determined that your newsracks adjacent to campus violate the city’s newsrack ordinance. The law bans from town sidewalks any newsracks that create litter problems. Your newsracks, the city manager says, are unsightly, and the papers tend to create litter. So the racks are already being removed from sidewalks.

This scenario raises several questions about basic principles of free expression. Might any of these actions by the business owner, the college president, or the city be violations of the First Amendment? Might the conduct code itself be unconstitutional? What are your rights?

lifestyles, college students speaking frankly about race, an artist whose work expresses unpopular views of religion, or political protestors burning an American flag, many have faced—and many will continue to face—hostility for ideas freely expressed. This chapter examines the notion of freedom of expression as embodied in the First Amendment of the U.S. Constitution.

It is important that communications students understand First Amendment dynamics because the amendment has in some way influenced all of this nation's communications industries, and it will continue to permeate the communications issues of tomorrow. The First Amendment is the nation's ultimate protection for communicators. But its strength is not guaranteed forever; that depends upon vigorous application in the courts and the vigilance of professional communicators.

To appreciate the First Amendment, you must know something of its historical background in England and the American colonies. Even before the beginning of mass communication in Western civilization—the advent of the movable type printing press in the mid-1400s—governments had attempted to control the free expression of ideas. Such freedom could lead to public criticism of those in power, and the powerful viewed criticism as a kind of disease that could topple them from command. So when the printing press arrived, with its ability to mass produce ideas at relatively little expense, it was greatly feared by those in control. In the seventeenth century, the British government began to make steady attempts to control mass communication. Through a tight system of licensing, the government decided who would have the right to publish, both in England and in the colonies. Under this system, the government also exercised **prior restraint** by prohibiting certain manuscripts or passages from being published at all, which is commonly called *censorship*. The crown justified this tight regulation of the media by citing the governmental responsibility to safeguard public welfare and civil stability.

One of the first arguments for freedom of the press was made by the poet John Milton in 1644 with the publication of *Areopagitica*. Milton's little book, which was subtitled *For the Liberty of Unlicensed Printing*, was written to support his efforts to publish unlicensed pamphlets about divorce—information that grew out of his own marital difficulties. Milton argued for what today would be considered a rather cramped notion of free expression: Only Protestant English men ought to have the right to free expression, argued Milton, who also served as a government book censor. Although *Areopagitica* had little effect when it was first published, Milton's eloquent call for freedom of expression has left its mark on the ages.

"Give me liberty to know, to utter, and to argue freely according to conscience, above all liberties,"<sup>1</sup> Milton wrote. Government does injury to truth by regulating communication, thus doubting the strength of truth, he said. Government should stay out of debates, Milton argued, and let truth and falsehood grapple, because in a free and open encounter truth will always come out on top.

Along with the ability to control publication in advance, of course, came the ability to punish after the fact those who did not follow the rules. And punish they did. Promoting ill opinions of the government and advocating change were regarded as serious crimes, often called **seditious libel**. In the seventeenth and eighteenth centuries, hundreds were convicted and commonly punished by fines, imprisonment, whipping, and the pillory.

In some cases, publications critical of the king were even punished as treason. One such example is described by Pulitzer Prize-winning historian Leonard Levy:

In 1663 William Twyn, for printing a book that endorsed the right of revolution, was held to have encompassed [imagined] the king's death; Twyn was sentenced to be hanged, cut down while still alive, and then emasculated, disemboweled, quartered, and beheaded—the standard punishment for treason.<sup>2</sup>

The power of the crown in Great Britain was curbed over time, as democratic tendencies increased. In the area of free speech, the first big step toward greater liberty came with the 1694 abolition of the licensing system in England. Governors of the colonies retained licensing a while longer. But public sentiment forced its demise there, too, in the early 1720s, after James Franklin (Ben's older brother) published his *New England Courant* in defiance of the license requirement and was jailed briefly.

A frequently cited highlight in the evolution of free expression is the 1735 trial of colonial printer John Peter Zenger. In truth, Zenger was a relatively small player in a high-stakes political struggle. New York's domineering governor, William Cosby, had angered residents of the colony with his attempts to control the local court and secure a higher salary for himself. A half-dozen prominent and intellectual citizens formed a political group to expose the governor's tactics and wrest power away from Cosby. But the group needed a communications vehicle, and Cosby controlled the area's only newspaper. So the opposition group founded its own newspaper, the *Weekly Journal*, and, using pseudonyms, proceeded to denounce Cosby and his actions. Zenger accepted the dangerous job of printing the paper. Predictably, Zenger was eventually imprisoned and charged with the crime of seditious libel.

The most remarkable part of this story, however, was the trial. Andrew Hamilton of Philadelphia, a well-known statesman and one of the most respected lawyers in the American colonies, had been quietly retained to defend Zenger. Hamilton's daring and eloquent argument was that Zenger should have the right to publish the truth, whether or not it was critical of a royal governor. The prosecution assumed it had the case won, for Zenger had effectively admitted the publications, and the law of seditious libel at the time did not recognize truth as a defense. But when the day was done, after hearing Hamilton argue against tyranny and for truth and the power of the jury, the jury returned a remarkable verdict of not guilty.



Strictly speaking, the Zenger case did not change the law at the time. However, accounts of the trial were widely read and quoted, and it may have played a significant role in reducing the government's perceived power and crystallizing public opinion in favor of a free press. Yet this is not to say that, following the demise of licensing and the victory of Zenger, the press became immediately and decisively freer. Other oppressive forms of control over expression remained in effect. Even after American independence, some of the controls, such as laws against seditious libel, were adopted in some form by the new nation.<sup>3</sup>

## REASONS FOR FREEDOM OF SPEECH

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Since Milton's time, many well-known writers, philosophers, legal scholars, and political figures have made forceful pleas for a policy of freedom of speech. But what does this concept actually mean? How much freedom? In what circumstances? Does freedom of speech simply mean the absence of any prior restraint on publication, as the great British judge and author William Blackstone argued in the 1760s?<sup>4</sup> Or should it mean something more?

Considerable debate about the proper ethical and legal boundaries of free speech continues today, of course. Some insight may be gained, however, by considering the main reasons, or justifications, that have been forwarded for protecting speech. These can be divided into social reasons and individualistic reasons.

### SOCIAL REASONS

Social or utilitarian reasons for freedom of speech are those that presuppose some particular, functional benefits to society. Among those most commonly cited are the following:

#### ***Discovery of Truth***

The premise is that freedom of speech is essential if individuals, and ultimately society as a whole, are to select the best ideas and move toward truth. Such a process calls for many voices expounding all sides of an issue. Only when this process is continued can judgments truly be enlightened.

This theory argues that, in a truly open marketplace of ideas, the truth will ultimately prevail. Even widely accepted truths should be tested from time to time against seemingly absurd ideas. The way to combat erroneous views is not to outlaw them but to inject superior views into the debate.

#### ***Participation in Democracy***

Some of the founding fathers of this nation viewed free and continual expression of ideas as essential to the successful functioning of a democracy. Without freedom of speech, voters would be more likely to remain ignorant or apathetic or be more easily deceived by the authorities in power. With freedom of speech, voters would

be more likely to participate meaningfully in democracy. Thomas Jefferson wrote in 1787, “The basis of our government being the opinion of the people, the very first object should be to keep that right,” and he urged that the people should have “full information of their affairs through the channel of the public papers.”<sup>5</sup>

A more recent advocate of this self-governance justification was philosopher and educator Alexander Meiklejohn, who wrote in the 1940s that protection of free speech in America

is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.<sup>6</sup>

Meiklejohn believed this function was so important that any speech relating to public affairs should receive absolute protection under the First Amendment.

### ***Check on Government***

Another social justification for freedom of speech is that it serves to deter or bring to light abuses of power by public officials. One of the best examples of this check-on-government benefit was the uncovering of the Watergate scandal during President Richard Nixon’s administration. The egregious abuses of authority—including campaign sabotage, wiretapping, laundering campaign money, and obstructing investigations—might never have been uncovered and punished had it not been for news media free to serve as aggressive watchdogs on government. History is replete, of course, with examples of government corruption. American media sometimes help to curb abuses by disclosing—at the local level, for example—squandered funds, payoffs, political favors, fraud, and conflicts of interest.

### ***Social Stability***

Another functional view is that freedom of speech actually helps assure social stability, contrary to the traditional assumption of some government officials that it disrupts society. This is because a free flow of information allows society to see its problems better and to respond with continual, incremental adjustments. It also allows displeased individuals to vent their anger before they reach the boiling point, a sort of therapeutic or safety valve effect. On the other hand, government suppression of speech in a quest for “order” breeds fear, resentment, and hate—the perfect mix for social unrest and a violent eruption against authority.

## **INDIVIDUALISTIC REASONS**

Another approach to justify freedom of speech is to argue that it is simply a natural or ethical right of individual human beings—that it is intrinsically, fundamentally good in itself, independent of any pragmatic benefits. The natural-right arguments have been stated in many different forms and over a prolonged period.

By the late 1700s, the founders of this nation and the framers of the U.S. Constitution, most notably Thomas Jefferson and James Madison, viewed government power as inherently limited. The limits are not determined by people, but by **natural law**, they argued. This term denotes rules of human conduct that conform to inherent, universal rights—rights emanating from nature or from God. In a natural law system, government would be obliged to protect, not infringe upon, inherent individual liberties. As communications law scholar Frederick S. Siebert wrote in *Freedom of the Press in England, 1476–1776*:

Under this theory of sovereignty, freedom of the press became one of the natural rights of man as derived from the law of God and incapable of infringement by any man-made power. According to this position, a government could not restrict the right to speak and to print, even to save itself from destruction.<sup>7</sup>

Another slant to this argument focuses on individual self-fulfillment. The theory is that free speech and free thought together are part of a person's essential nature and dignity and that, morally, people must be free to discover their true natures and to experience the unique characteristics of being human.

By historical accounts, our nation's founders themselves held differing views about what free speech meant and why it was so important. Skepticism is warranted, therefore, whenever a modern-day pundit boldly proclaims what this First Amendment freedom "was meant to protect." Furthermore, as noted above, at least some of the founders believed free speech and free thought were simply part of the natural, "inalienable" right of liberty—proclaimed worth fighting for in the Declaration of Independence.

## REBUTTAL

The reasons cited for protecting speech, both social and individual, are of course open to some rebuttal. To the discovery-of-truth theory, for example, it may be argued that in a system of totally uncontrolled communication the theory's assumptions are not always correct. That is, in a marketplace of countless messages, the truth may not always be sifted out; it may even be obscured. Furthermore, on the way to discovering truth, false messages may cause considerable harm over the short term. (In recognition of this, the courts have upheld laws against deceptive advertising, for example, as discussed in Chapter 12.) And it can be said that the promotion-of-democracy benefit will be realized only if the mass media cover public affairs thoroughly and responsibly and that some government prodding is necessary to ensure such responsibility. Even the natural law concept may be attacked as simply too vague to support specific legal policy and inadequately attentive to other inherent rights that may conflict with free speech.

For the most part, American courts have upheld the notion that freedom of speech, as embodied in the First Amendment to the Constitution, is wise policy deserving of strict enforcement. Speech in the United States has never been totally free, however, and the protection of the First Amendment is not considered absolute.

## ADOPTION OF THE FIRST AMENDMENT

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Experience with suppressive policies of Great Britain during the American colonial period caused many Americans immediately following the Revolution to be fearful of any centralized government. Thus, in order to ensure popular support for adoption of the U.S. Constitution and the national government it would establish, the framers found it necessary to promise a bill of rights that would set limitations on the government. Those limitations were ratified in 1791 as the first ten amendments to the Constitution.

The First Amendment was written chiefly by James Madison, who had consulted the speech clauses in various state constitutions. Despite a commonly held belief to the contrary, no convincing evidence exists that the framers viewed the First Amendment as the most important in the Bill of Rights. Its position is merely an artifact of history. Two other amendments in the original Bill of Rights proposal actually preceded what is cherished today as the First Amendment. Because neither of those amendments was adopted, the free expression guarantee in effect defaulted into its number one position. The First Amendment reads in full:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This book is most concerned, of course, with the speech and press clauses. What did the framers of the Constitution actually mean?

Despite the seemingly clear and absolute terms of the First Amendment, some form of interpretation has been necessary whenever free expression has come into conflict with other societal interests. For example, just as the First Amendment guarantee against restriction of speech appears uncompromising, so too does the Sixth Amendment directive that those accused of crimes shall have the right to trial by an “impartial jury.” What happens when two such rights collide? The answer is an interpretation by the courts. The raw language of the Constitution itself simply does not supply the answers.

The most obvious approach to interpretation is to look at the historical setting surrounding the adoption of the First Amendment to determine what its authors

intended. This approach has proved of limited use, however. Constitutional history scholars generally conclude that the framers harbored broad disagreement over what “freedom of speech” meant in specific situations. Did the authors of the First Amendment intend to change the existing common law to abolish all central government restrictions on expression? Or did they presume that existing restrictions, such as criminal laws against seditious libel, were not within the scope of the amendment’s prohibitions? Few of the framers bothered to write their views on such matters of specific application. Thus historical inquiries and references to the language itself are usually inconclusive.

In the two hundred years since the First Amendment became the law, the courts have painstakingly weighed competing interests and considered public policy, in addition to pondering the language and history of the First Amendment, in order to flesh out the bare wording of the amendment. Comparatively speaking, the courts have breathed considerable power into free speech law in the United States, and they have generally applied First Amendment precedent consistently since the 1960s, avoiding vacillation in the face of the prevailing public opinion of the day.

Yet this is not to say the courts are fully immune to public opinion and politics. Sitting judges may be influenced by significant events in the news, and certainly the executive and legislative branch members of government who appoint and confirm judges are influenced by current events and public opinion. Therefore, professional communicators who have a special stake in First Amendment application should stay vigilant regarding public opinion on freedom of speech and should, when appropriate, seek to mold that opinion with facts and insights.

Since 1997 the First Amendment Center at Vanderbilt University each year has commissioned a survey to measure how Americans view their freedoms. The survey typically has found that while Americans in general like the concept of free speech, the commitment to that ideal is soft. In specific situations, many say they would welcome government regulation. For example, in the 2008 survey, two-thirds of respondents said government should be able to require TV stations to give equal time to liberal and conservative commentators, and nearly as many would allow the same control over newspapers. Nearly 40 percent said the press in America has too much freedom.

News events can sway opinion even further toward deference to government. Public support for free speech eroded significantly following the September 11, 2001, terrorist attack on New York and Washington, D.C., for example. Nearly 50 percent of those surveyed for the First Amendment Center in 2002 said the First Amendment goes too far in its protections, roughly a 10-percent jump from before the attack. It appeared many Americans viewed First Amendment liberties as obstacles in the war on terrorism.<sup>8</sup>

The remainder of this chapter looks at basic principles of First Amendment application, focusing on those of greatest relevance to the field of mass communication.

## NATURE OF THE GUARANTEE

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What is the basic nature of the rights afforded under the First Amendment? In other words, in what kinds of situations is the amendment's guarantee even a relevant issue?

### LIBERTY VERSUS GOVERNMENT POWER

Remember that the Bill of Rights was born specifically to counter fears of a strong central government. Thus, the First Amendment states only that "*Congress* [italics added] shall make no law. . ." At the time the Bill of Rights was adopted, several state laws were on the books prohibiting blasphemy, obscenity, libel, slander, mockery of religion, and the like. The legality of these laws was never an issue when the Bill of Rights was being considered, because the First Amendment was seen only as a safeguard against the tyranny of some future Congress. Over time, the First Amendment was interpreted to apply not only to congressional acts but to all federal government acts, by whatever branch or agency of the government. Still, it was understood that the Bill of Rights prohibited only *federal* encroachments on individual liberty, and this view was affirmed in a Supreme Court decision in 1833.<sup>9</sup>

The reach of the Constitution underwent a momentous extension beginning in 1925, however. In the landmark case of *Gitlow v. New York*,<sup>10</sup> the U.S. Supreme Court indicated for the first time that the First Amendment would be applied as a limit on *state* governments to the same extent as on the federal government. This expanded application was linked to the Fourteenth Amendment, which states in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Fourteenth Amendment, adopted in 1868 after the Civil War, was designed originally to prohibit individual states from limiting the rights that former slaves enjoyed as citizens of the United States. The Supreme Court in *Gitlow* interpreted the amendment's language more specifically to mean that the First Amendment's free speech guarantee had been incorporated as a standard for the states. For such an important development as this, the Court's pronouncement was made in a rather terse and incidental fashion:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the 1st Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the 14th Amendment from impairment by the states.<sup>11</sup>

In later cases, the Court similarly has applied most other provisions of the Bill of Rights to the states by way of the Fourteenth Amendment. This is referred to as the **doctrine of incorporation**.

The result of all this constitutional evolution is that today the First Amendment is read to prohibit all government bodies—local and state, as well as federal—from abridging free expression. The amendment remains a limit only on governmental action, however. As in the rest of the Bill of Rights, the issue is individual liberty versus government power. First Amendment liberty is not a matter of freedom from intrusion by other private citizens or private groups. Rather, the First Amendment serves as a restriction on government control over speech.

A privately owned and funded school, for example, may legally censor a student newspaper at will because this would not constitute government action. Similarly, an editor at a privately owned newspaper does not unconstitutionally censor a writer's article by editing it, and the MTV cable channel did not violate the First Amendment in 1990 when it deemed a Madonna music video too racy for its program. For the First Amendment protections to kick in, there must have been some state action—a term often used to apply to any government action that potentially infringes on expression. **State action** may come in the form of laws, court orders, or the judgments and actions of individual officials.

Consider again the Hypothetical at the beginning of this chapter. Given the basic structure of the First Amendment, it is clear that the destructive action of the local business owner would not amount to a violation of the Constitution, although civil and criminal actions for theft, destruction of property, and the like might well be appropriate. But the incident presents no confrontation between personal liberty and *government* intrusion.

## EXPRESSION VERSUS CONDUCT

One of the threshold problems in First Amendment law is to define what constitutes *speech* or *press*. Freedom of speech and of the press are both mentioned specifically in the First Amendment, but are the terms to be read in a narrow sense? What about expressive activity other than oral or printed words, such as pictures, dances, and gestures? What about actions that express ideas?

As culture and technology have evolved, the Supreme Court has interpreted the word *speech* to mean all forms of expression, verbal or otherwise, that are designed to communicate ideas. There would be little logic in reading the term so narrowly as to mean the relaying of information by word of mouth but not, for example, by means of modern videotape.

But implicit in the language of the First Amendment is that a distinction is to be made between expression and pure conduct, or action. Expression in its many forms is protected, but conduct is not. In most mass communications situations, this distinction poses no difficulty. Communicators have a constitutional right to print that elected city officials should be recalled, for example, but no constitutional right to throw rocks through the windows at city hall.

### **Entertainment**

Many forms of entertainment, including motion pictures, theatrical performances, and dancing, have been deemed protectable expression. Even nude dancing has been so classified, when performed specifically to entertain and communicate with others. The U.S. Supreme Court declared in a 1991 case involving nude barroom entertainment: “[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.”<sup>12</sup>

On the other hand, activities undertaken predominantly for self-entertainment or recreation are labeled conduct, not expression, and are without First Amendment protection altogether. In a 1989 decision that recreational social dancing was not a form of expression, the Supreme Court explained: “It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street, or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”<sup>13</sup>

### **Symbolic Speech**

Difficult cases sometimes result when speech seems closely intertwined with what normally would be pure conduct. Conduct—such as hoisting a flag, wearing a colored armband, or even burning a piece of paper—is referred to as **symbolic speech** or **expressive conduct** when performed in a manner intended to convey a particular message to others. The courts have deemed this hybrid form of speech to be within the guarantee of the First Amendment, though it is not always protected as broadly as other forms of expression.

One of the more hotly debated First Amendment issues in recent years involved a symbolic speech problem: the emotional issue of flag burning. In 1984 Gregory Johnson, a member of the Revolutionary Communist Youth Brigade, torched an American flag outside the Republican Convention in Dallas. His conduct was part of a demonstration to protest foreign policies of the Reagan administration. Johnson was prosecuted under Texas law for “desecration of a venerated object” and was sentenced to a year in prison and fined \$2,000.

In a 5–4 decision, however, the U.S. Supreme Court held in 1989 that the flag burning in this case was expressive conduct protected by the First Amendment. The majority opinion in *Texas v. Johnson* was by Justice William Brennan, one of the high Court’s most ardent First Amendment advocates from 1956 until his retirement in 1990. He wrote:

The First Amendment literally forbids the abridgement only of “speech,” but we have long recognized that its protection does not end at the spoken or written word. While we have rejected the view that an apparently limitless variety of conduct can be labeled “speech” whenever the person engaging in the conduct



intends thereby to express an idea, . . . we have acknowledged that conduct may be “sufficiently imbued with elements of communication to fall within the scope of the [First Amendment].” . . .

The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent.<sup>14</sup>

This case also serves to illustrate the broader political and emotional nature of some First Amendment debates. Following the Court’s decision, President George H. Bush called for a constitutional amendment against flag burning. Congress instead decided to pass a statute, the Flag Protection Act. Along came another court test, this time involving four protestors who set a flag afire in front of the Seattle Post Office. The case found its way to the Supreme Court in 1990, and the federal statute, like the Texas law before it, was ruled unconstitutional.<sup>15</sup> Following the ruling, Congress tried several times to pass a constitutional amendment to prohibit flag desecration, but it could not muster the necessary two-thirds approval in both houses. In 2005 Congress was debating the issue yet again, with a proposed amendment that read, “The Congress shall have the power to prohibit the physical desecration of the flag of the United States.”

## GATHERING AND DISTRIBUTING

Another aspect of interpreting the words *speech* and *press* is whether they include the adjunct activities of gathering information in preparation for expressing oneself and then using distribution channels to deliver the expression to others.

On the first question, the answer generally has been no. The First Amendment usually is not interpreted to include a right to gather information, even if the gathering is closely linked to planned expression. Once information has been obtained, communicators do have the general right to speak and publish. But only in limited circumstances does the First Amendment guarantee that the doors to information be open in the first place (as discussed in Chapters 6 and 7). Except for a few narrowly defined circumstances, the amendment generally is not interpreted to guarantee a right to get or receive information. A major portion of this book deals with legal rights of access and information gathering, but those rights for the most part are not constitutional in origin. Of course, if someone wants to speak to you and the government interferes, this may be a violation of the speaker’s First Amendment rights.

*Speech* generally has been interpreted to include distribution, however. Rights of free speech do not end when a pamphlet is printed or a TV show is videotaped. Speech rights include the right to disseminate to an audience. In the chapter Hypothetical, for example, circulation of your newspapers, in this case through

newsracks, is within the concept of speech. Still to be determined, however, is whether you are protected from the particular kind of state action in question.

## SUSPECT RESTRICTIONS

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The First Amendment is a shield that is available when free speech is being abridged (diminished) by government. However, the scope of protection does not extend to all situations in which speech is inadvertently affected or burdened in some way. For example, the taxation and labor laws that apply to businesses across the board may also be applied to media businesses. These laws may reduce the funds available for a business's news department and thus affect speech. But this is an unintended, secondary effect not shielded by the First Amendment. On the other hand, the amendment can provide freedom from very subtle interferences, indeed—if they are intended to suppress speech specifically because of its content. As discussed next, there need not be a complete ban on expression in order to raise First Amendment concerns.

### PRIOR RESTRAINTS

The First Amendment guarantee protects most clearly against prior restraints upon the content of speech, typified by censorship schemes or court injunctions prohibiting publication. Even in cases where expression is not protected from after-the-fact lawsuits and prosecution, the First Amendment is often interpreted to bar any form of government censorship prior to publication.

#### ***Near v. Minnesota***

Probably the single most important decision formalizing the doctrine against prior restraint was the 1931 case of *Near v. Minnesota*. As detailed in the aptly titled book about the case, *Minnesota Rag*, by Fred Friendly, *The Saturday Press* was at best a scurrilous publication. J. M. Near's newspaper attacked those who violated Prohibition, the constitutional amendment experiment that from 1919 to 1933 made it illegal to produce or sell alcoholic beverages. The newspaper, which also had a tendency to publish anti-Semitic barbs, was accused of extorting money from Prohibition lawbreakers. Those who got caught breaking the law and who did not want the publicity so generated could, if they bought enough advertising or simply made a large enough cash payment to the publication, keep their names out of the news. The newspaper also published articles charging that public officials were neglecting their duties to control bootlegging, gambling, and other crimes.

After nine issues of the paper were published, the local county attorney went to court without notifying Near and obtained an injunction prohibiting publication of future issues. The trial court upheld the injunction on the ground that

*The Saturday Press* was a public nuisance. In a historic 5–4 decision by the U.S. Supreme Court, the state’s prior restraint of future issues was held unconstitutional. Wrote Chief Justice Charles Hughes for the majority:

[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. . . . The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional rights. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.<sup>16</sup>

The *Near* case, then, stands for the general principle that “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”<sup>17</sup> Prior restraints are what the First Amendment most certainly was intended to protect against, the Court has concluded. The general theory behind this is that prior restraints create a great danger of government suppression and that societal interests are better served in the long run if abuses of free expression are dealt with after the fact—by civil lawsuits or criminal penalties.

This is not to say that prior restraints on speech are never allowed, however, as discussed in later chapters. In the *Near* opinion itself, the Court noted a few exceptional instances when prior restraint might be permitted. Those instances were communications that would hinder a war effort, obscene publications, and incitements to acts of violence. But as a general rule, prior restraint is considered the worst kind of abridgment, and it is permitted only in rare situations when harmful expression could not adequately be punished after the fact. One of the most famous First Amendment cases of all time, the 1971 case of the Pentagon Papers, was a high-stakes prior restraint duel that concerned national security. Chapter 3 will examine that case.

### ***Licensing***

One of the most blatant forms of prior restraint is a court injunction prohibiting publication, such as the one at issue in *Near v. Minnesota*. But prior restraints can take many other forms, including licensing schemes for communicators. Courts have frequently declared license requirements to speak or circulate to be forms of prior restraint on the content of expression and therefore presumptively unconstitutional. This can be true even for license requirements far less oppressive than the much despised system enforced by England in the 1600s.

For example, a suburb of Cleveland passed an ordinance requiring annual licenses in order to place newsracks on public sidewalks. The mayor was given authority to grant or deny the license applications. The ordinance was challenged and held unconstitutional by the U.S. Supreme Court in 1988. Justice William

Brennan, writing for the majority, said it was “time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.”<sup>18</sup> This is so, he said, because “unbridled” licensing schemes pose two major First Amendment risks: The first is self-censorship by communicators in order to avoid denial of a license. The second is the risk that officials will apply content-based censorship, in a manner difficult to detect, behind the mask of the licensing law.

This does not mean that all types of communication licensing are considered prior restraints on content; some may qualify as time/place/manner restrictions, discussed later in this chapter. Nor does it mean that a license requirement, even if a prior restraint, can never be constitutional. A federal licensing scheme for broadcasters has been upheld, for example, and is detailed in Chapter 9.

### ***Informal Coercion***

Prior restraint of expression may also arise through less formal actions by government officials, such as pressuring communicators to sign oaths or threatening to prosecute or to publicly chastise. Even government actions couched as friendly advice may actually amount to prior restraints of expression.

For example, in 1989 a controversial rap music recording titled *As Nasty as They Wanna Be* went on sale to the public. The recording, by the group 2 Live Crew, went on to sell more than a million copies in its first year. In Florida’s Broward County, however, complaints about the record’s sexually explicit lyrics prompted a sheriff’s investigation. The sheriff’s office purchased a *Nasty* tape from a record store, delivered it to a local judge, and obtained a court order stating there was “probable cause” to believe that the recording was obscene and illegal under Florida law.

Next the sheriff’s office copied the court order and sent it to all retail stores countywide that might be selling the *Nasty* recording. This approach was taken to “warn the stores as a matter of courtesy,”<sup>19</sup> rather than make immediate arrests. Sheriff’s deputies also paid personal visits to record stores and told the managers “in a friendly, conversational tone” that they should stop selling the recording. Managers were warned that further sales could lead to arrest. Within days, all retail stores in Broward County stopped offering the recording for sale. This result was obtained even though there had yet been no formal criminal proceeding against the musical group or anyone else connected with the recording—and no formal ruling that the recording actually was obscene.

The musical group and its record company sued, and in *Skywalker Records v. Navarro*, a federal judge declared the threatening actions of the sheriff’s office an unconstitutional prior restraint of free speech:

When arguably protected work clothed in the presumption of constitutional free speech is removed from public distribution, the state has imposed a prior

restraint. . . . Although the music store operators were the immediate parties who stopped distributing the recording, they so acted only after the police visits and the delivery of the court's probable cause order.<sup>20</sup>

The ruling would be different, the court said, if police had simply informed stores how generally to comply with the law—without stating or implying threats over specific material.

Another classic example of informal restraint was addressed by the Court in the 1963 case of *Bantam Books v. Sullivan*. Rhode Island had created a commission to combat juvenile delinquency, and one of its powers was to inform the public of literature that contained obscenity or that otherwise tended to corrupt youth. The commission's practice was to notify distributors of certain books or magazines that had been declared objectionable by a majority of the commission. The list of objectionable publications also was supplied to police departments. The effect of the notices was to intimidate wholesale distributors and retailers and cause them to cease selling or even ordering the materials.

Four publishers of paperback books sued, claiming that sales of some of their books, which were not actually obscene, had been suppressed by this process and that their First Amendment rights had been violated. The Supreme Court agreed, holding that the activities of the commission were unconstitutional. Wrote Justice Brennan for the majority:

It is true that [the publishers'] books have not been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed “objectionable” and succeeded in its aim.<sup>21</sup>

## PUNISHMENT AFTER THE FACT

Considerable agreement exists among legal historians that the First Amendment was intended primarily as a protection against prior restraints on expression. Punishment after publication was, and is, generally considered a more acceptable way to deter irresponsible speech, because it allows the communicator to make a reasoned decision about whether something can and should be expressed—and only thereafter pay the penalty if the decision was improper. In theory subsequent punishment is less oppressive than prior restraint because, to be punishable, the alleged abuses must be specifically and individually proved in court.

But the Supreme Court has recognized that often little practical difference exists between prior restraint and subsequent punishment of expression. Particularly when the laws are vague, or the sanctions overly harsh, the prospect of after-the-fact punishment may serve to chill expression every bit as much as

a prior order not to publish. Sometimes the distinction itself seems illusory. For example, a portion of the court order at issue in *Near v. Minnesota* perpetually enjoined *Near* from producing any defamatory publication in the future. Is that injunction (a typical form of prior restraint) truly any different from a criminal statute prohibiting defamation and specifying penalties? In practice, there may be no difference to the speaker.

Given the functional haziness of the distinction, it is well established today that subsequent sanctions, too, may abridge free expression in violation of the First Amendment. Punishment is allowed for many kinds of errant speech, as you will see throughout this book, but only within carefully tailored lines set by the courts. Sanctions based on the content of expression do indeed raise a First Amendment issue.

Subsequent sanctions against speech usually come in the following three basic forms: (1) contempt citations issued by courts, under which communicators may face fines or jail time; (2) enforcement of criminal statutes and regulations, which may lead to fines, loss of privileges, or even prison; and (3) private lawsuits for torts or breach of contract. (These lawsuits qualify as state action against communicators because government's laws and enforcement mechanisms are what make the lawsuits possible.)

### ***Hateful and Offensive Speech***

Even the punishment of speech that appears highly irresponsible, derogatory, and hateful can raise serious First Amendment concerns. For example, the late 1980s saw an alarming increase in racial intolerance on some college campuses. In response, several public colleges and universities adopted stricter policies prohibiting "racist" or "sexist" speech on campus. The University of Michigan instituted a broad policy that prohibited students, under penalty of sanctions, from "stigmatizing or victimizing" individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status. Many other campuses enacted similar policies.

Does such a policy violate rights of free speech under the First Amendment? In 1989 a federal District Court said yes, to the extent that such policies are applied to pure speech. The court ruled in favor of a University of Michigan psychology student who feared that discussion of certain theories about biological race and gender differences might be perceived as racist and sexist and therefore sanctionable under the campus policy. The court began its opinion by noting: "It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict."<sup>22</sup> But no matter how well intentioned the university's policy, the court said, rules that punish speech solely on the grounds that it is unseemly or offensive are consistently held to be unconstitutional.

In 1992 the U.S. Supreme Court reached a similar result in a highly publicized hate-speech case. The case, *R.A.V. v. City of St. Paul*,<sup>23</sup> arose when a teenager burned a crudely made cross inside the fenced yard of a black family. The conduct could have been punished under a variety of laws, such as laws against arson, damage to property, or trespass. Instead the prosecutor decided to charge the juvenile with a violation of the city's bias-motivated crime ordinance, which made it a misdemeanor to place on public or private property any symbol that one knows would arouse anger or resentment in others on the basis of race, color, creed, religion, or gender. The Court held the ordinance unconstitutional because it prohibited speech solely on the ground of the nature of the speaker's views. The First Amendment does not permit a city to impose special prohibitions on those speakers who express disfavored or offensive views on particular subjects, Justice Antonin Scalia said in his majority opinion.

This principle that offensive speech is generally protected would also apply to the Hypothetical at the beginning of this chapter. Government ordinances and speech codes sometimes aim to curtail language that is too raw for the tastes of many people. But even assuming the student's choice of words may not have been professional or wise, the First Amendment generally prohibits punishing someone—including students at public college campuses—for failing to live up to the majority's standards for good taste or proper judgment in expression.

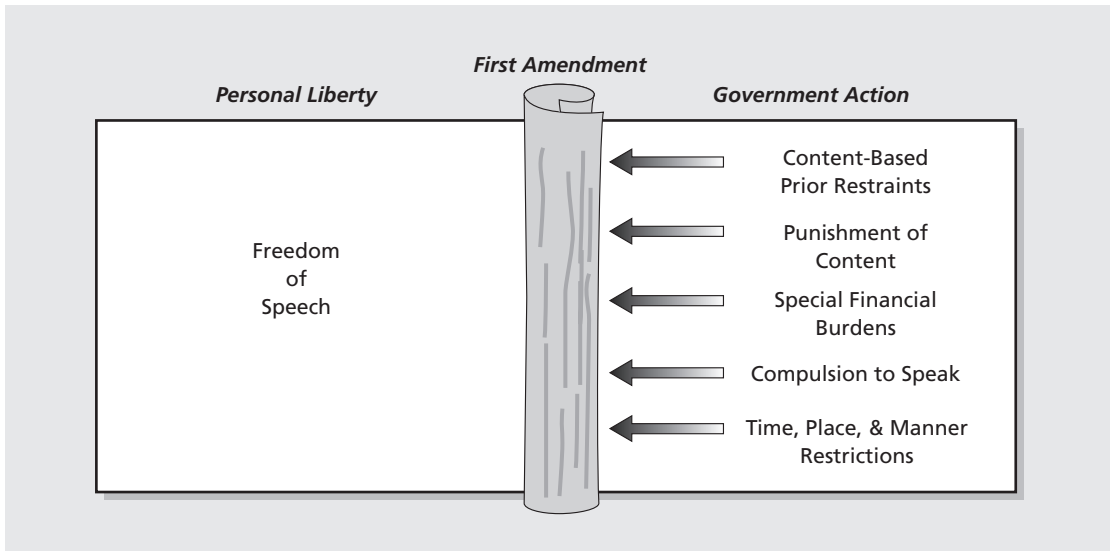
## FINANCIAL BURDENS

General business taxes, as noted earlier, do not raise First Amendment concerns when applied uniformly to media and nonmedia businesses. However, when taxes, fees, or other financial burdens discriminate against communicators, or among them, those financial burdens do indeed raise serious First Amendment concerns. (See Exhibit 2.1 for a summary of actions that arouse the First Amendment.)

Government's power to tax and levy fees may not be employed to punish or subdue expression. Furthermore, even when no such censorial motive is present, discriminatory financial burdens are adverse to the First Amendment because of their chilling potential for abuse. Courts sometimes categorize financial burdens as prior restraints. But whether or not they are so classified, it is clear that financial burdens may run afoul of the First Amendment.

A leading case on this point is *Simon & Schuster v. Crime Victims Board*, a 1991 ruling by the U.S. Supreme Court. At issue was a New York statute that aimed to prevent persons who had committed crimes from unjustly profiting from their stories. The statute required that a convicted person's income from works describing his crime be deposited in an escrow account to benefit the crime victims. If any medium contracted with the convicted person to produce the work, it was the medium's responsibility to turn over the author's income to the Crime Victims Board. Thus, the statute imposed a financial burden that could discourage

## EXHIBIT 2.1 Actions That Raise the First Amendment Shield



people who had committed crimes from publishing their stories or contracting with the media to do so.

Book publisher Simon & Schuster had contracted with an organized crime figure turned government witness, Henry Hill, to produce a book about Hill's life. The book, *Wiseguy*, was favorably reviewed as an insightful look into crime in America. However, the Crime Victims Board sought to invoke the escrow statute, and Simon & Schuster sued to have the law declared unconstitutional.

The Supreme Court began its analysis by noting a basic principle from earlier cases: "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."<sup>24</sup>

The Court found that New York's statute was indeed content based, singling out income from works that recount crimes and thereby serving as a "financial disincentive" that could inhibit Simon & Schuster's ability to produce books about crime. Though the state clearly had an interest in aiding crime victims and preventing criminals from profiting from their crimes, New York's statute was too broadly drafted to overcome the presumption against constitutionality, the Court said.

### **Taxes**

General business taxes, as noted earlier, don't violate the zone of First Amendment protection when applied uniformly to media and nonmedia businesses alike. However, when tax laws discriminate against media businesses, or among them, the laws become a form of prior restraint. Government's power to tax may not be



employed to punish or subdue expression. Furthermore, even when no such intent is actually present, discriminatory taxation schemes qualify as prior restraints because of their chilling potential for abuse.

For example, in 1987 a Supreme Court case involved a challenge to Arkansas's general sales tax. Certain kinds of media products were exempt from the tax, including "religious, professional, trade and sports journals." General interest magazines, however, were subject to the tax. The Court held the selective taxation invalid. "Our cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment," Justice Thurgood Marshall wrote for the majority. Even when there is no evidence of an improper censorial motive, he said,

selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State. . . . [T]he basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles [because] a magazine's tax status depends entirely on its *content*.<sup>25</sup>

## COMPELLED SPEECH

The First Amendment is offended not only by government efforts to prohibit or punish speech but also by laws that **compel speech**. A corollary of the right to speak one's mind is the right not to be a government-coerced messenger for others' views.

This principle is basic and long established, but it can become complex and controversial when applied in mass media situations. The typical scenario is this: Government passes a law mandating some degree of individual access to the mass media in order to increase the plurality of voices—an effort clearly in the spirit of free speech and an open marketplace of ideas. But the media take exception because, from their perspective, they are being made unwilling conduits for others' expression.

### **Media Access Laws**

The theory of forced access gained wide acceptance after the Commission on Freedom of the Press, the so-called Hutchins Commission (named after its chairman, University of Chicago President Robert Hutchins), released its famous and somewhat controversial 1947 report, *A Free and Responsible Press*. In that publication, the commission argued that, although the media should be free, marketplace forces were constricting ownership, which in turn reduced the number of voices in the free marketplace of ideas. This, the commission argued, was just as deadly as governmental censorship. Therefore, the government should play a residual role in assuring responsible press performance.<sup>26</sup>

The commission's recommendation, though seemingly well thought out, was fraught with logical fallacies. For example, a thorough critique of the

recommendations of the commission is John Merrill's *The Imperative of Freedom*,<sup>27</sup> in which the author notes that a decrease in media owners does not necessarily mean a decrease in message plurality. In addition, once a free press is forced to be responsible, it is certainly not free and arguably not necessarily responsible—only chained. Nevertheless, some media law scholars, such as lawyer and professor Jerome Barron, have argued that individuals should have a right of access to the American mass media.<sup>28</sup> The issue came to the U.S. Supreme Court in the 1974 case of *Miami Herald Co. v. Tornillo*.

Pat Tornillo, a 1972 candidate for the Florida House of Representatives, had been taken to task in an editorial in the *Miami Herald*. The newspaper had criticized him for his role a few years earlier as a teachers' union leader who had led an illegal strike. Tornillo demanded an opportunity to respond. His demand was based on a state statute that required a newspaper to publish free replies by political candidates who had been criticized by the newspaper. It was a crime for the paper to refuse to publish verbatim the candidate's reply in the same type size and in as conspicuous a location as the original editorial. The newspaper did refuse, however.

The Florida trial court found the statute unconstitutional, but the state supreme court reversed the decision, holding that free speech was enhanced, not abridged, by the right-of-reply statute. The case went next to the U.S. Supreme Court. In a unanimous ruling, the Court struck down the access law as an unconstitutional violation of the newspaper's First Amendment rights. Wrote Chief Justice Warren Burger for the Court:

A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated. . . . A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press.<sup>29</sup>

Chapter 10 will detail how legislated access to radio and television to reply to certain kinds of attacks was held constitutional. This distinction, said the Supreme Court in *Red Lion Broadcasting Co. v. FCC*,<sup>30</sup> is due to the limited nature of the broadcast spectrum and the need for the government to regulate that limited resource in the public interest.

### ***Compelled Financial Support***

Another interesting application of the principle against compelled speech arises when people are required to *finance* others' expression. Financing expression is itself a form of expression, and the Supreme Court has held that people cannot be compelled by government to fund political speech with which they disagree.

For example, the Court held in the 1990 case of *Keller v. State Bar of California*<sup>31</sup> that the State Bar could not use lawyers' mandatory dues to fund political and ideological activities, including lobbying. The Court said mandatory dues could fund activities germane to the Bar's central purpose of regulating the legal profession, but not ideological activities outside that central purpose.

Another interesting angle to this First Amendment principle can arise on college campuses. Several students at the University of Wisconsin–Madison, for example, sued the university on the ground that a portion of their mandatory \$165-per-semester activity fee was being used to subsidize private student groups whose political and ideological speech they found objectionable. The student plaintiffs objected to funding eighteen campus organizations, including the Student Labor Action Coalition, the Militant Student Union, and the International Socialist Organization. A federal Court of Appeals in 1998 held that forcing the objecting students to fund such organizations violated the First Amendment.<sup>32</sup>

In 2000, however, a unanimous U.S. Supreme Court reversed the Court of Appeals. In *Board of Regents of the University of Wisconsin v. Southworth*,<sup>33</sup> the Court concluded that, unlike the situation in *Keller*, it would be virtually impossible to determine which part of the extracurricular campus speech was “germane” to the broad educational mission of the university and which was not. Therefore, Justice Anthony Kennedy wrote, the First Amendment permits a public university to charge an activity fee to fund speech by student groups—so long as the method for allocating the funds is entirely viewpoint-neutral.

### **Attribution Requirements**

For many years, state and federal laws have imposed various attribution requirements on mass political expression. Attribution laws typically state that any advertising, display, or handout materials that support or oppose particular candidates or ballot measures must also identify the sponsor of the message. The laws cover not only the advertising done by registered candidates themselves but also that of independent organizations stating opinions on candidates or ballot measures. It has long been thought that requiring attribution is one way to discourage political hit pieces laced with defamation and lies.

These laws were thrown into doubt, however, by the 1995 Supreme Court ruling in *McIntyre v. Ohio Elections Commission*. Margaret McIntyre had distributed leaflets at a public meeting where the local schools' superintendent planned to discuss an upcoming school tax referendum. The leaflets expressed McIntyre's opposition. Ohio law required that all such political messages intended to influence an election must contain the name and address of the person or organization issuing the message. But McIntyre's leaflets were signed only “concerned tax payers.” McIntyre was fined \$100 for violating the law.

The Supreme Court ruled that the Ohio statute violated the First Amendment, however. Wrote Justice John Paul Stevens for the Court: “Under our Constitution,

anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.”<sup>34</sup> The Court noted, for example, that the Federalist Papers urging ratification of the Constitution were written by James Madison, Alexander Hamilton, and John Jay, but were signed only “Publius.” The Court said the Ohio law indiscriminately outlawed a whole category of speech without the overriding justification necessary for such a broad ban. It noted that, if libel is the concern, it can be discouraged via the state’s more narrowly aimed libel laws.

The Court left open the possibility that some attribution laws would be constitutional. But in the years following *McIntyre*, attribution requirements were struck down in several states. For example, Maine election law required that when a political action committee spent money to advocate a ballot measure, the message had to list the name and address of the PAC that authorized the communication. The Yes for Life Political Action Committee wanted to run broadcast ads and distribute handbills urging voters to ban so-called partial-birth abortion in a November 1999 election. But it wanted to distribute its messages without the required disclosures, so it challenged the requirement. Following the *McIntyre* precedent, a federal District Court held Maine’s law unconstitutional.<sup>35</sup> But as we’ll see in Chapter 10, courts have, in contrast, upheld a law requiring broadcast stations to identify sponsors of all advertising, including political messages.

## TIME, PLACE, AND MANNER RESTRICTIONS

The scope of protection discussed so far has concerned freedom from government efforts to influence the content of expression. What if government attempts to control an avenue of expression, but for reasons allegedly unrelated to its content? Examples would be a city ordinance requiring all billboards to be at least ten yards from streets for traffic safety reasons or an ordinance limiting the hours and volume for sound trucks in residential neighborhoods.

These kinds of controls are known as **time, place, and manner (TPM) restrictions**. They may result in significant inconvenience or added expense for communicators, but the restrictions are not intended to limit or control any particular sort of content. TPM restrictions do indeed raise First Amendment concerns. The protection against TPM restrictions is weaker, however, than the protection against most content-based interferences. Therefore, it is important to distinguish between a TPM restriction and a content restriction.

Many court cases have focused on whether a government action actually qualified as a TPM restriction. To do so, the restriction must be honestly **content-neutral**. That is, the real purpose of the restriction may not be to curb certain messages on the basis of their content. If the action is actually a content restriction in disguise, the scope of First Amendment protection against the

restriction is much greater, and the government action is more likely to be ruled unconstitutional.

To pass the content-neutral test, the government action must leave no room for administrative discretion. In other words, a government official must not hold authority to prevent the communication of some messages, while allowing others to proceed, on the basis of personal bias. TPM restrictions must use consistent, across-the-board guidelines. For example, laws that require door-to-door leaflet distributors to first obtain the approval of some government official—usually based upon a showing of “proper purpose” or “good moral character”—are not constitutionally valid. Because such restrictions invest too much administrative discretion in the government officials, they do not pass the content-neutral test.

On the other hand, the U.S. Supreme Court in 1981 upheld a rule that restricted literature distribution and fund solicitation to an area of fixed booths at the Minnesota State Fair. The rule was challenged by the International Society for Krishna Consciousness because members could not wander the grounds freely to sell religious literature. But the Court found that the rule was content-neutral. All literature distributors were automatically under the same restrictions, with no unbridled discretion vested in state fair officials.<sup>36</sup>

In the past few decades, attempts by cities to regulate the placement of newsracks on their streets have been an often litigated First Amendment issue. Those cases provide additional illustrations of attempted TPM restrictions.

Ordinances that prohibited newsracks where they would unreasonably interfere with traffic on streets or sidewalks, where they would interfere with sidewalk cleaning machinery, and where they would obstruct access to mailboxes and emergency facilities such as fire hydrants have been upheld as constitutional. Ordinances specifically drafted to prevent interference with traffic, to protect people from defective racks, and to advance significant aesthetic interests also have been upheld.<sup>37</sup>

On the other hand, laws that authorized the revocation of newsrack permits by an administrator for no given reason, that failed to set standards for controlling the discretion of a mayor or city council in issuing newsrack permits, that vested review boards with standardless discretion to review newsrack designs, that required a newspaper to obtain a permit from the chief of police—who was vested with vague and virtually limitless decision power—and that discriminated against newsracks containing free or adult-oriented tabloids were deemed to violate the First Amendment.<sup>38</sup>

Would the newsrack seizure mentioned in the Hypothetical at the beginning of this chapter qualify as a valid TPM enforcement? The ordinance itself might be unconstitutional, for it seems to allow too much administrative discretion by the city manager to decide what amounts to a litter problem. The ordinance could too easily be a veil behind which the city might punish a particular newspaper

for its content. For the ordinance to be a valid TPM restriction, it would need to state specific criteria for the acceptability of newsracks and leave no room for discriminatory application. Furthermore, circumstances suggest that the city might be suddenly removing newsracks because of the paper's controversial stance that very same day.

## RESOLVING CONFLICTS

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This chapter has looked at the general structure of the First Amendment and examined the sorts of government interference that are deemed to raise First Amendment concerns. But even if speech is clearly involved and government action clearly interferes with it, the questions remain: Is this interference acceptable under the First Amendment, or is it a violation of the law? Most of the major interpretation battles involve this question. Is some speech simply too worthless to command protection? Or, even if the speech is worthwhile, are the government's reasons for interfering so significant that they override protection?

### RIGHTS NOT ABSOLUTE

The First Amendment guarantee is absolute on its face. Yet majorities of the Supreme Court have long believed that guarantees in the Bill of Rights must bow to some limitations.

Over the years some distinguished scholars and jurists have pleaded for an absolute approach to applying the First Amendment. The **absolutists** argue that speech should be subject to *no* government restrictions or penalties, just as the actual language of the amendment states, though typically these thinkers have taken a narrow view of what constitutes *speech*.

For example, scholar Alexander Meiklejohn argued that speech that contributes to self-governance should be afforded an absolute protection, regardless of its motive or nature. "No one who reads with care the text of the First Amendment can fail to be startled by its absoluteness," Meiklejohn wrote in his 1948 book, *Free Speech and Its Relation to Self-Government*. "The phrase 'Congress shall make no law . . . abridging freedom of speech,' is unqualified. It admits no exceptions."<sup>39</sup>

Others who have argued for some form of absolutist approach to interpretation of the First Amendment include former Supreme Court Associate Justices Hugo Black and William O. Douglas. Black interpreted his absolutism narrowly, arguing that because speech and press freedoms were mentioned explicitly, only those strict forms of expression were protected. Douglas took a broader view. He considered even symbolic speech—wearing armbands, burning draft cards,

and the like—within the scope of complete First Amendment protection. In 1951, Justice Douglas wrote:

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” The Constitution provides no exception. This does not mean that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious *conduct* can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech. . . . The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. . . . Unless and until extreme and necessitous circumstances are shown our aim should be to keep speech unfettered and to allow the processes of law to be evoked only when the provocateurs among us move from speech to action.<sup>40</sup>

Ten years later Justice Douglas admonished his Supreme Court colleagues for their tendency to weigh the value of particular speech to determine whether it deserved protection:

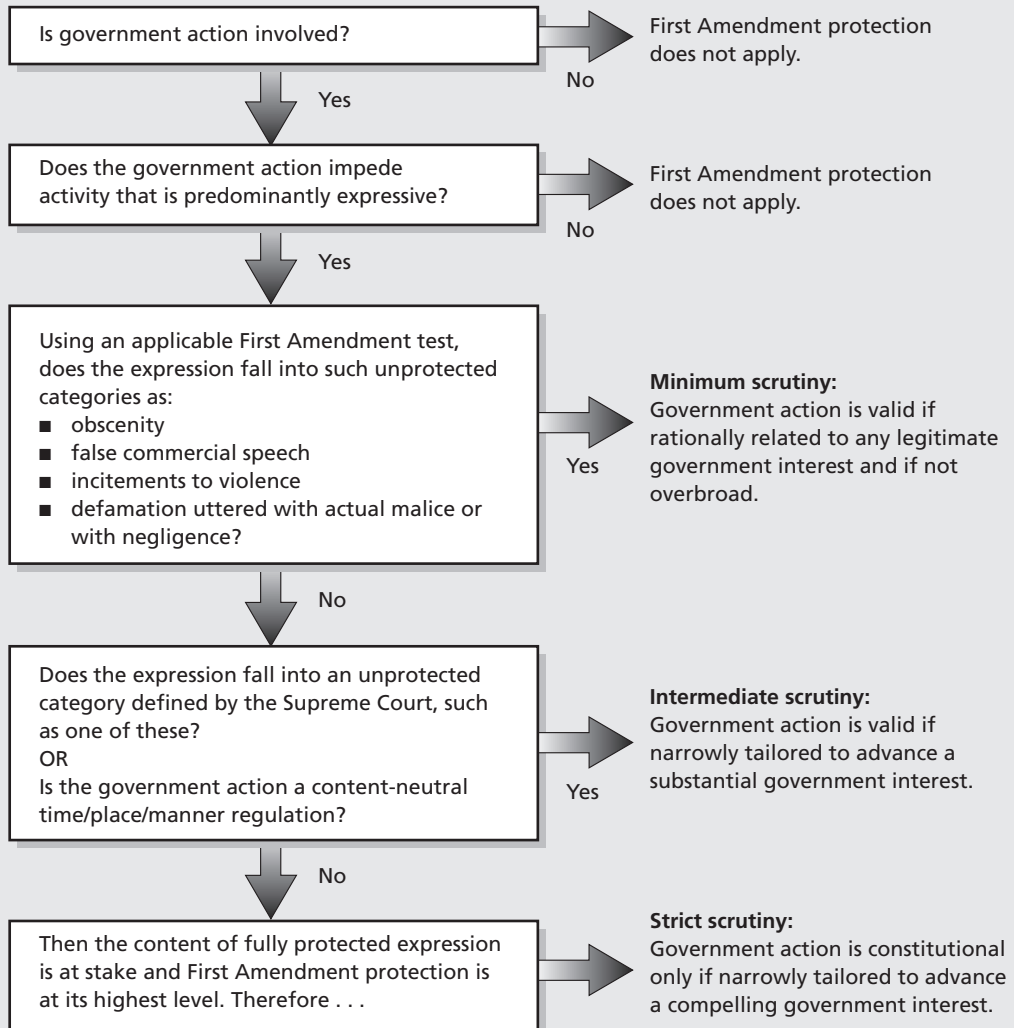
In recent years we have been departing, I think, from the theory of government expressed in the First Amendment. We have too often been “balancing” the right of free speech and association against other values in society to see if we, the judges, feel that a particular need is more important than those guaranteed by the Bill of Rights. . . . This approach, which treats the commands of the First Amendment as “no more than admonitions of moderation,” . . . runs counter to [James] Madison’s views of the First Amendment.<sup>41</sup>

Absolutist approaches to First Amendment interpretation—though often expressed in eloquent terms—have never commanded a majority of the Supreme Court, however. Through the years, the Court has carved out dozens of limitations and exceptions to First Amendment protection. This book will examine many of them, including libel, invasion of privacy, incitement to violence, interference with justice, and deceptive advertising. The Court has used a variety of methods to arrive at its limitations to First Amendment freedoms. Thus a key question to ask in any clash over First Amendment rights is what standard the courts will use to resolve the conflict. (A streamlined graphic depiction of First Amendment application is found in Exhibit 2.2.)

## UNPROTECTED SPEECH

One way the Supreme Court has limited First Amendment freedoms is to place certain categories of expression outside the amendment’s protection. One of the best examples of an unprotected category is obscenity, covered in Chapter 11. (“This much has been categorically settled by the Court, that obscene material

## EXHIBIT 2.2 Application of the First Amendment



*This diagram is a simplified depiction of how the First Amendment is applied by the courts. Some doctrines add further complication. For example, if the expression at issue is categorized as "symbolic speech," either strict or intermediate scrutiny may apply, depending on whether the government action is aimed at the conduct portion or the speech portion. Also, the doctrine against prior restraint may cause actions against even unprotected expression to undergo tougher scrutiny.*



is unprotected by the First Amendment,”<sup>42</sup> wrote Chief Justice Burger in 1973.) Some other unprotected categories include false or misleading commercial advertising, perjury, so-called fighting words, and libel that is published with a requisite degree of fault. Another classic category of unprotected speech is incitement to violent or dangerous conduct—a topic that will be examined in Chapter 3.

For each of these categories, the Supreme Court has established a particular test, or definition. In a given case, the key task may be to determine whether the speech actually fits the Court’s definition of an unprotected category. Theoretically, setting aside several clearly defined categories of unprotected speech—and declaring all other speech to be protected—provides greater guidance and certainty than a system in which virtually all speech may be subjected to a case-by-case, circumstantial review. In practice, however, the application of category definitions is often accompanied by its own degrees of uncertainty. For example, Chapter 11 relates how lower courts have been inconsistent in their attempts to apply the Supreme Court’s three-part test for obscenity.

### ***Minimum Scrutiny***

Once it is determined that some particular expression falls within an unprotected category—meaning no First Amendment freedom is at stake—the government action that interferes with that speech typically will be upheld as constitutional. This is because the government has no special First Amendment hurdle to clear. The government action is scrutinized in court only to the extent that it must be rationally related to a legitimate government interest.

The **rational basis standard** represents the minimum level of justification that all government restrictions on freedom must meet in order to comply with the due process clauses of the Fifth and Fourteenth Amendments. In cases involving restrictions on unprotected speech, this standard is easily met unless government is achieving its purpose in some patently arbitrary fashion. For example, a ban on obscenity would generally be valid, but not if it arbitrarily targeted only materials costing \$100,000 to \$200,000 to produce.

### ***Overbreadth and Vagueness***

For a statute or other government action to be upheld, however, it is further required that its impact be limited to the targeted speech. Legislation that punishes protected speech as well as the targeted, unprotected expression typically is held unconstitutional under the **doctrine of overbreadth**. Restrictions on speech will be deemed overbroad if they encompass any significant amount of protected speech along with the expression that may be regulated legitimately.

The overbreadth doctrine is commonly employed in First Amendment cases. Even though the speech involved in a particular controversy may be unprotected, the government restriction may be attacked as unconstitutional on the



### Is the Restriction Valid?

- Does the government restraint apply to a narrow, nonprotected category of expression?
- Or is the restraint limited to commercial speech or symbolic speech and supported by a substantial justification?
- Or is the restraint supported by a compelling justification?
- And, in any case, is the restraint no broader than necessary to serve the government's purpose?

ground that it would, in other situations, penalize protected speech. For example, suppose that, in an effort to ban obscenity, a state passed a law making it illegal to distribute any materials that “depict sexual conduct or nudity.” A person who is prosecuted under this statute for selling materials that were indeed obscene, and therefore unprotected, could nevertheless challenge the validity of the statute because its wording is so broad as to also outlaw materials that are protected under the First Amendment. Laws may be challenged as either overbroad on their face, meaning as written, or overbroad as applied by government officials.

Closely related to the overbreadth doctrine is the **void-for-vagueness doctrine**. Statutes and regulations that restrict speech, if they do so in terms too vague to provide clear guidance, may be struck down as unconstitutionally vague. The rationale is much the same as that behind the overbreadth doctrine. That is, if a law fails to draw clear distinctions between the speech that is prohibited and that which is not, a danger of inconsistent and unpredictable enforcement exists, and the law may effectively stifle speech well beyond its intended range.

## THE BALANCING APPROACH

Limitations to First Amendment protection are also arrived at by weighing in a given situation the considerations favoring freedom against the considerations favoring government intervention. Former Harvard Law School Dean Zechariah Chafee has been one of the proponents of the basic balancing approach that has commanded a majority of the Supreme Court in recent years. Chafee contends that all parts of the Constitution must be examined together in relation to one another so as to define the extent and limits of each in harmony with the others. But when balancing First Amendment rights against other constitutional rights or obligations, freedom of expression should begin with extra weight. As he argued in his 1941 book, *Free Speech in the United States*:

One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through

absolutely unlimited discussion. . . . Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale.<sup>43</sup>

In other words, no category of speech is absolutely protected in Chafee's view. Instead, speech is always subject to balancing against other governmental/societal interests to determine whether interference is legally acceptable. In the balancing process, however, the scales are not set evenly. Speech weighs heavily from the beginning, so that competing government interests must always be important in order to justify restraints on expression. This general approach to interpreting the scope of First Amendment protections is sometimes called **preferred position balancing**. The inquiry begins with speech occupying a preferred position, and the government must overcome that position by demonstrating sufficient reasons why the speech in a given situation should not be constitutionally protected.

The specific balancing standard—sometimes referred to as the **standard of judicial review**—is determined by the nature of the speech or the circumstances in which the speech appeared. Presuming the speech in question does not fall into one of the narrow categories of unprotected expression discussed earlier, the government must show at least a “substantial” interest, and usually a “compelling” interest, in order to override the First Amendment. Another way to state this is that, in comparison with the minimum level of scrutiny given to restraints on unprotected speech, government restrictions on protected speech must undergo either strict scrutiny or intermediate scrutiny.

### ***Strict Scrutiny***

In most cases, restrictions on protected expression can be upheld only if they directly further a compelling government interest and are no broader than necessary to advance that interest. This is the **strict scrutiny** test, which means that government interference is allowed only if the government proves the gravest of justifications. A **compelling interest** is a justification of great magnitude—for example, directly protecting the nation's very existence, safeguarding life or limb, or shielding children from lasting emotional harm. It is the strictest of standards, one that the government rarely can meet when attempting to justify a restriction on speech. (See the sample case excerpt from *Cohen v. California* that follows, in which the Supreme Court ruled that even a profane phrase was protected speech in the absence of a compelling reason to prevent it.)

Not only must restrictions on fully protected speech be justified by a compelling interest, but the restrictions themselves must also be “narrowly tailored.” This means they must indeed accomplish the government's purpose, and their scope must be no broader than necessary.

## ***Cohen v. California***

**403 U.S. 15 (1971)**



From the majority opinion by Justice John Harlan:

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal code §415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by offensive conduct. . . ." He was given 30 days' imprisonment. . . .

### **The facts**

The conviction was based on the following facts: In 1968 Cohen was observed in the corridor of the Los Angeles County Courthouse wearing, in the presence of other people, a jacket bearing the plainly visible words, "Fuck the Draft." Cohen testified that he wore the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft. Neither he nor anyone else threatened to commit any act of violence.

### **I**

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present.

### **Speech not conduct**

. . . The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only "conduct" which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech," . . . not upon any separately identifiable conduct. . . .

### **Unprotected category?**

. . . [T]his case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. . . .

### **Not "Fighting" words**

. . . This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called fighting words, those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. . . .

### **No exception for "unwilling audience"**

Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest.

Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. . . . [I]f Cohen’s “speech” was otherwise entitled to constitutional protection, we do not think the fact that some unwilling “listeners” in a public building may have been briefly exposed to it can serve to justify this breach-of-the-peace conviction. . . .

II

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as “offensive conduct,” one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

Overriding  
rationale  
present?

The rationale of the California court is plainly untenable. At most it reflects an “undifferentiated fear of apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.” *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969). . . . Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic. We think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. . . .

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. . . .

No Compelling  
Reason

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not consistently with the First and Fourteenth Amendments, make the simple public display here involved on this single four-letter expletive a criminal offense. . . .

Conviction  
Unconstitutional

Reversed.

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The best general example of speech that receives this highest level of protection is that which is intended primarily to convey political or social ideas or facts. Restrictions aimed at the content of such speech must typically undergo this strict level of judicial scrutiny. As Chief Justice William Rehnquist wrote in 1988, “*At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.*”<sup>44</sup>

### ***Intermediate Scrutiny***

In a few kinds of free speech cases, the government can override the First Amendment guarantee by showing that a restraint on speech furthers a substantial government interest and is no broader than necessary to advance that interest. A **substantial interest** is an important or significant one, though not necessarily one of the utmost gravity. In other words, when this level of scrutiny applies, the speech has a markedly lower degree of protection than in strict scrutiny situations. Court cases have identified as substantial such justifications as promoting smooth operation of a government program, protecting community order and tranquility, safeguarding private economic interests, indirectly promoting public health, and upholding basic notions of morality.

Truthful commercial advertising is one of the best examples of speech that is afforded only a moderate degree of First Amendment protection. The Supreme Court has said that because commercial speech is intended mainly to generate a self-serving transaction, rather than to contribute to social discourse or understanding, it is not the kind of speech that warrants the fullest extent of protection. Thus, when the State of New York banned all promotional advertising by electrical utilities on the ground that such ads were contrary to state energy conservation goals, the Supreme Court applied the substantial interest standard. The state’s interest in conserving energy was indeed substantial, the Court said in 1980. (However, the complete advertising ban was ultimately ruled unconstitutional on the ground of overbreadth.)<sup>45</sup>

Time, place, and manner restrictions pertaining to any kind of protected speech are also reviewed at the **intermediate scrutiny** level. Remember, TPM restrictions must, first of all, be content-neutral. If this is the case, a restriction will be upheld if in addition it (1) furthers a substantial government interest and (2) leaves open ample alternative channels for communication of the message.

For example, in a case mentioned earlier, the U.S. Supreme Court upheld a rule that restricted literature distribution to an area of fixed booths at the Minnesota State Fair. The rule was challenged by the International Society for Krishna Consciousness, which wanted to distribute literature throughout the grounds. Once the Court concluded that the rule was truly content-neutral, it proceeded to apply the intermediate standard of scrutiny. The Court identified a substantial government interest (ensuring orderly crowd movement), and the rule



### Is It a Valid TPM Restriction?

- Is the restriction on expression truly content-neutral?
- Is the restriction justified by a substantial government interest?
- Are reasonable, alternative channels of communication still available?
- Is the restriction no broader than necessary to serve the government's purpose?

left ample opportunity to distribute literature effectively from a booth. Therefore, it was a constitutionally valid time, place, and manner restriction.<sup>46</sup>

Cases involving expressive conduct (symbolic speech) also may be decided at the intermediate scrutiny level. Recall that these cases involve the application of some restriction to conduct that has been injected with a particular message.

The constitutional inquiry in these cases begins by determining whether the government restriction was aimed at the conduct element or at the expression. If the government regulation was aimed strictly at the conduct, the regulation will be upheld in most cases, under essentially the same inquiry used in TPM cases. But if the aim was really to suppress the underlying expression, the regulation is judged at the strict scrutiny level and nearly always will be held unconstitutional.

In the case of *United States v. O'Brien*,<sup>47</sup> for example, a man had burned his military draft registration certificate on the steps of a Boston courthouse in the presence of a large crowd. His action was intended to be a demonstration against the war in Vietnam. O'Brien was convicted under a federal statute that made it a crime to knowingly destroy draft cards, and he appealed on First Amendment grounds.

The Supreme Court in 1968 ruled that the punishment against O'Brien's expressive conduct could be upheld as long as the federal restriction (1) was not aimed at suppressing expression, (2) was in furtherance of a substantial government interest, and (3) was no greater than necessary to achieve that interest. These requirements were met, the Court held, because the legislation was adopted not to suppress political expression but to protect the government's substantial interest in maintaining a smooth and efficient Selective Service System. The availability of draft cards allowed officials to quickly verify men's Selective Service status. Therefore, the Court concluded that O'Brien was convicted not for his message of protest, but purely because of the noncommunicative conduct—the burning itself—that frustrated the government's organizational efforts.

In contrast, recall the flag-burning case of *Texas v. Johnson*, discussed earlier. Justice Brennan concluded that the Texas law against burning a flag actually was aimed at the expressive component of the symbolic act—at the message behind burning the flag, not purely at the conduct. This conclusion had the effect of

bumping the level of judicial scrutiny up to the highest level. For the law to be constitutional, the state needed a compelling justification, and Brennan found none: “If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,”<sup>48</sup> he wrote.

## SPECIAL PROBLEM: GOVERNMENT FACILITIES AND MEDIA

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A special perplexity arises when government attempts to control speech within its own media or facilities, such as county parks, city-owned auditoriums, public-school newspapers, or government employee newsletters. Should controls in these places be classified as prior restraints, just as they would be in other instances? Or is government merely exercising a right to control its own medium, much as the publisher of a commercial newspaper may dictate that paper’s content?

### THE FORUM THEORY

The legal answer depends on whether the facility or medium is maintained by the government as a **public forum**, a place either specifically designed or traditionally used for the exercise of free speech by the public. As a general rule, government has the power to exercise control over the use of its own property. However, if a public forum has been created, government attempts to control the content of speech in that forum are presumptively invalid prior restraints. In essence, once government installs a soapbox for the public, it cannot restrict the ideas expressed thereon.

If a city traditionally allowed speeches, plays, and dance performances at its civic auditorium, for example, a public forum would exist. Denial of access to a particular speaker or organization on the basis of its message would amount to a prior restraint on expression.<sup>49</sup> In a public forum, such restraint virtually always will be unconstitutional, unless government can prove the restriction is necessary to serve a compelling interest.

On the other hand, courts are unlikely to declare such places as government office lobbies or military bases to be public forums.<sup>50</sup> To qualify as a forum, the facility must be one where free exchange of ideas is traditionally a principal purpose—such as public parks—or where free speech is a specifically designated purpose. All other government facilities for communication are nonpublic forums, where government generally may control speech on any reasonable ground, without risk of a First Amendment violation.

A U.S. Supreme Court decision in 1998 dealt with this distinction. The Arkansas Educational Television Commission is a state agency that operates a network of noncommercial TV stations. Its staff planned a one-hour, televised debate among the leading contenders for one of the state’s congressional districts.



An independent candidate asked to participate, but the AETC's executive director denied the request, saying viewers would be better served in the short time available by limiting the debate to the major party candidates. The independent candidate sued, claiming that he had a First Amendment right to participate because the government-owned broadcast operation had set up a public forum. But the Supreme Court ruled in *Arkansas Educational TV Commission v. Forbes*<sup>51</sup> that the debate was a nonpublic forum because it was designed from the start with very selective participation in mind, not with the intent to open the doors of AETC facilities to all candidates. The debate was never designed as an open microphone format. Furthermore, the majority held, the decision to exclude the independent candidate was a reasonable, journalistic judgment. The Court noted that the candidate was excluded not because of his specific views, but because he had not generated significant public interest. Therefore, the selective debate was not a violation of any candidate's First Amendment rights.

## THE STUDENT PRESS

The forum theory has played a particularly important role in free speech disputes involving student media at public high schools and colleges. A long line of federal and state court cases has declared that school administrators possess no legal authority to censor student publications just because the publications are owned by the school. Rather, the critical question is whether the school was operating a forum for student expression. Furthermore, courts typically have ruled or assumed that student publications indeed constitute forums. Even when publications were part of the curriculum and were closely supervised by school employees, courts traditionally held that an open forum existed if the publication aired student viewpoints on a variety of subjects.<sup>52</sup> And once a student forum exists, censorship is unlawful except when necessary to protect other students' legal rights or to prevent substantial disruption of the school environment.<sup>53</sup>

### *The Hazelwood Case*

Although many lower courts adjudicated student press cases in the 1970s and 1980s, the U.S. Supreme Court did not rule on the student press until 1988. That year, in *Hazelwood School District v. Kuhlmeier*,<sup>54</sup> the Court significantly narrowed application of the forum theory on campus. In *Hazelwood*, the Court upheld censorship by a high school principal in Missouri.

The *Hazelwood* dispute arose over two scheduled stories in the high school's newspaper. One described three high school students' experiences with pregnancy; the other discussed the impact of divorce on students at the school. During his customary prepublication review, the principal concluded that the stories were written unfairly and were inappropriate for younger students at the

school. He ordered that the two pages containing those stories be withheld from publication. Three of the student staff members sued.

The majority of the Supreme Court characterized the school newspaper as a laboratory paper—not as a public forum. School facilities become public forums, wrote Justice Byron White, only if school officials open the facilities for “indiscriminate use” by the students. And that had not occurred at Hazelwood East High, even though the paper traditionally covered a wide range of subjects and even published letters to the editor. Weighing against forum status, the Court said, were the facts that the newspaper was solely the product of a regular journalism class, taught by a faculty member who selected the editors and assigned and edited the stories. Without forum status, the newspaper’s content could be regulated by the school “in any reasonable manner” without having to overcome a strict First Amendment test.

Some student press experts were concerned that the *Hazelwood* decision would swell the incidence of censorship on campuses. A nationwide survey conducted the following year concluded that high school publications experienced a slightly higher level of censorship following the *Hazelwood* decision. The poll also found that 8 percent of the surveyed principals and 17 percent of the newspaper advisers believed the Court’s opinion had changed the legal status of their campus papers.<sup>55</sup>

The Supreme Court in *Hazelwood* declined to state whether the same analysis would apply to publications produced on college and university campuses, where a more open tradition of free speech exists, or whether a broader standard for forum status would apply. Lower courts have reached differing conclusions.

For example, in the 2001 case of *Kincaid v. Gibson*,<sup>56</sup> two student writers at Kentucky State University sued campus officials on grounds that they confiscated and refused to distribute the 1992–94 student yearbook in violation of the students’ First Amendment rights. Campus officials were displeased with the yearbook because of its “Destination Unknown” theme, because many of the photographs were unrelated to campus, and because many of the campus photos lacked captions.

The full Court of Appeals for the Sixth Circuit, reversing the trial court, held that the Supreme Court’s *Hazelwood* conclusion did not apply to the university yearbook. The publication qualified as a limited public forum, the court said, because it was designed for use by student writers and photographers with minimal oversight by a student publications board. No campus official supervised the work, either by policy or in practice. Following a typical university model, editorial control was placed in the hands of the students. The court also specifically distinguished the university environment of young adults from the high school context of less mature students in *Hazelwood*.

Because the yearbook was a limited public forum, officials were not entitled to impose content-based restrictions absent a compelling justification. Confiscation of the yearbook in this case could not be justified under that standard, and the court ordered summary judgment in favor of the student plaintiffs on their First Amendment claims.

In contrast was a 2005 ruling by the Court of Appeals for the Seventh Circuit in *Hosty v. Carter*.<sup>57</sup> The student newspaper at Governors State University, the *Innovator*, published items critical of the campus administration. Student editors refused to retract assertions the administration deemed false and also refused to print the administration's responses. The dean of student affairs then called the *Innovator's* printer and told it to print no further issues unless they were approved by the administration. The student journalists sued campus officials for damages, claiming infringement of the students' First Amendment rights.

The court said that a *Hazelwood*-type forum analysis was applicable to college publications and that students' more mature age is not a major factor in deciding whether a public forum has been established. The court went on to note that although some facts certainly suggested a public forum, such as the extracurricular status of the paper, other facts related to the paper's college subsidy could have led a reasonable college administrator to believe the paper was subject to administrative control. Therefore, without ultimately resolving the public forum question, the court held that college officials were entitled to legal immunity from damages.

In some states, greater certainty about the free-press rights of school and college students is achieved by statute. California, for example, has for many years had a package of statutes protecting student journalists on public high school and college campuses and according those students broader rights than generally derived from the First Amendment. In 2008 Governor Arnold Schwarzenegger signed legislation further strengthening those statutes. The new legislation prohibits a school or college *employee* from being fired, suspended or reassigned for acting to protect a student's lawful expression.<sup>58</sup>

### ***Morse v. Frederick***

The U.S. Supreme Court revisited student expression in 2007 in the case of *Morse v. Frederick*. Though not a student press case, it accorded considerable deference to school officials and could have ramifications for all forms of student expression, whether individual, through private media, or through a school-run forum.

As a Winter Olympics torch relay passed through Alaska, students at a public high school along the route were allowed to leave class and stand at the street to observe the event. Teachers and administrators supervised. As the torch and news media approached, a senior student, Joseph Frederick, unfurled a banner that read, "BONG HiTS 4 JESUS." The school principal immediately demanded the

banner be taken down, but Frederick did not comply. The principal confiscated the banner and later suspended Frederick because, the principal said, the banner promoted drug use in violation of school policy.

Frederick sued, alleging his First Amendment rights were violated, and the lower federal courts reached opposite conclusions. The Supreme Court held that this was a school-sanctioned class outing where school officials have the authority to reasonably enforce school policies. Even though the meaning of the banner was not entirely clear, the principal could have reasonably believed that it celebrated illegal drug use, the Court said, and deterring drug use among students is a sufficiently important interest to support the principal's actions.<sup>59</sup> The Court failed to articulate an explicit test for determining school officials' scope of control over student expression. But the Court majority adopted a fact-based approach that gives immunity to officials who act in good faith to enforce school policies. This puts student expression at a relative disadvantage, however, and is contrary to the more vigorous First Amendment inquiry that would normally apply outside the school environment.

It's not certain what the legal legacy of the *Bong Hits* case will be. But *Morse* was noted prominently in a federal district court ruling in 2008. An eighth-grade student created a bogus personal profile on MySpace.com with the picture of her principal at a Pennsylvania middle school. The profile presented fictional and highly unflattering quotes and stories that essentially indicated the principal was a pedophile. The student created the page on her home computer, outside of school hours. But news of the site quickly spread to campus and to the principal, who determined that the student violated school policy prohibiting false accusations against staff. After receiving a ten-day suspension, the student filed a First Amendment lawsuit, saying the school could not punish her for a nonthreatening parody created outside of school, on her own time, and which did not substantially disrupt the school.

Citing *Morse*, however, the court held that schools may restrict student speech that is vulgar and lewd, or promotes unlawful conduct, and which is aimed at a school audience, even if it occurs off campus. This Web page was indeed vulgar and aimed at the campus audience, the court said, and therefore the disciplinary action was upheld.<sup>60</sup>

### ***Access to Advertising***

Most litigation involving the student press has concerned efforts by public school officials to control news or editorial content. But what about the question of access to the school-owned media by advertisers or others? Would it make a difference whether the medium is a public forum? Should the law allow student editors of forum publications to be free from content controls by officials while also allowing the editors to deny access requests by outsiders? Should school

officials have the power to bar access by outsiders, based on content? In 1989 the U.S. Court of Appeals answered some of these access questions.

Planned Parenthood had sought to place an ad in high school newspapers, yearbooks, and athletic event programs in Las Vegas. The family planning group's ad simply stated its address and announced the availability of routine gynecological exams, birth control methods, pregnancy testing, and pregnancy counseling. However, the ads were rejected at some of the high schools under guidelines that prohibited publishing ads for birth control products or information.

Planned Parenthood sued, claiming a First Amendment right of access to the taxpayer-supported publications. The Court of Appeals ruled in favor of the schools. Citing *Hazelwood*, the court said the publications were not set up or operated as public forums. Therefore, school officials were free to regulate their content in any reasonable or rational manner. School principals rejected the ads because they believed it was best for their schools to appear completely neutral on such controversial subjects as birth control methods. The court deemed this reasoning sufficient to support the restriction.<sup>61</sup>

## SPECIAL PROBLEM: CORPORATE SPEECH

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The U.S. Supreme Court has said consistently that the First Amendment's guarantees protect corporations just as fully as individuals. Throughout this book, in fact, you will see that the plaintiffs in free speech lawsuits typically are media corporations, rather than the individual editors, writers, news directors, or announcers who may actually do the speaking at the corporations' media properties. Furthermore, the Court has held that business corporations of all sorts generally have the same First Amendment rights to speak out as do media corporations.<sup>62</sup> This means substantial protection for the legions of communications experts who work as marketing, public relations, or public information professionals for banks, consumer goods companies, hospital systems, and other nonmedia corporations.

Nevertheless, corporate expression has long been restricted in certain circumstances for either of two reasons: (1) protection of the investment markets and (2) protection of the political process. Constraints for these reasons are deemed constitutional not because the content of corporate speech is somehow less worthy; indeed, corporations can contribute much to public discourse on the most serious matters of economics and public policy. Rather, restrictions are imposed because of the unique financial structure of corporations and the special responsibilities owed to their investors.

Corporations are privileged business entities created under authority of state law. They are accorded their own personalities, or legal status, entirely separate from the personalities of any individual stockholders or officers. Corporations can own property, incur debts, sue, and be sued in their own names, for example, quite

apart from the activities of the individuals who own or manage the corporation. In this way corporations are different from partnerships or sole proprietorships, the other main forms of business ownership.

The states recognize many different kinds of corporations, such as professional corporations, nonprofit corporations, family-owned corporations, and for-profit business corporations that amass capital—in some cases billions of dollars of capital—by selling shares through the public stock exchanges. These business corporations actually are owned by the investors, or stockholders, who in turn elect a board of directors to steer the corporation. It is this type of corporation that is subject to the greatest restrictions on speech.

## PROTECTING INVESTMENT MARKETS

Business corporations raise capital in large part by offering to investors various kinds of stocks and bonds, known collectively as corporate securities. Once on the market, most types of securities may be freely traded, meaning bought and sold, by speculating investors. This trading is usually accomplished through a national stock exchange. Business corporations and the stock markets actually are complex and also fragile institutions. They are fragile in the sense that they depend on honest communications and absolute fairness with respect to all investors. Since the stock market crash of 1929 and the Great Depression, investor-oriented corporate expression has been regulated heavily by federal statute and the Securities and Exchange Commission (SEC). All corporate announcements of likely significance to investors may be scrutinized by the commission.

As noted earlier, government violates the First Amendment not only when it bans speech, but also when it compels speech. Despite this general rule, the government compels corporations to disclose considerable information for the benefit of investors. The disclosures are made through an array of formal documents and reports that are filed with the SEC, and the reports must follow government requirements as to form, content, and timing. These disclosure requirements have never been held to violate a corporation's First Amendment rights. Among the most important corporate filings are securities registration, annual reports, quarterly reports, and proxy materials.

In addition to these disclosure and filing requirements, several laws generally prohibit fraudulent or misleading corporate communications in any context relevant to investors. The most far-reaching of these laws is an SEC regulation known simply as Rule 10b-5, which reads as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state

a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.<sup>63</sup>

At first glance, Rule 10b-5 is just a basic antifraud law that prohibits people from misleading others in connection with the purchase or sale of corporate securities. The rule prohibits untrue statements of a material nature, meaning statements that would likely be considered by investors when deciding whether to purchase or sell securities. On the surface, then, 10b-5 is little different than state statutes that prohibit fraudulent statements by a person selling an automobile.

However, 10b-5 has enormously broad implications because of the manner in which corporate stocks are bought and sold in the United States. Rarely are stock transactions made face to face, like auto sales. Instead, stocks are bought and sold anonymously through national stock exchanges. The seller has no idea who the ultimate purchaser of the stock will be, nor does the purchaser have any idea of the identities of the sellers who have made their shares available on the exchange.

Nevertheless, Rule 10b-5 applies, and the practical ramification of this is far-reaching: Corporations must release financial news to the media so that it is available to existing or potential investors; the news must be released in a timely fashion; and the releases must be completely accurate in all material respects. Whenever corporate financial news is not promptly or accurately disseminated, investors around the country are essentially buying or selling securities under false suppositions, and the corporation is violating Rule 10b-5.

The classic case is *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, a 1968 federal appeals court decision. Texas Gulf Sulphur (TGS) had conducted exploratory drilling in Canada that revealed remarkably good deposits of copper and zinc. A handful of company insiders knew of the confidential exploratory drilling results, and the company moved ahead with a land acquisition program. When drilling resumed, a few TGS officers received daily progress reports, but the reports were kept confidential. They revealed a substantial, commercially minable body of ore.

Meanwhile, rumors of a major ore strike began circulating throughout Canada, and eventually two New York newspapers ran unauthorized reports that implied a rich strike by TGS. With the aid of a public relations consultant, the company vice president drafted a press release designed to quell the rumors. The release, which appeared in several newspapers, read in part as follows:

NEW YORK, April 12—The following statement was made today by Dr. Charles F. Fogarty, executive vice president of Texas Gulf Sulphur Company, in regard to the company's drilling operations near Timmins, Ontario, Canada. Dr. Fogarty said: "During the past few days, the exploration activities of Texas Gulf Sulphur

in the area of Timmins, Ontario, have been widely reported in the press, coupled with rumors of a substantial copper discovery there. These reports exaggerate the scale of operations and mention plans and statistics of size and grade of ore that are without factual basis and have evidently originated by speculation of people not connected with TGS. . . .”<sup>64</sup>

The *New York Herald Tribune*, in a story headlined “Copper Rumor Deflated,” quoted from the TGS release and backtracked from its earlier report of a major strike. Drilling continued for several more days before TGS made an official announcement of its find at a press conference.

Based on these actions by TGS, the Securities and Exchange Commission prosecuted a complaint against the company for violation of Rule 10b-5. The court held that the release may have violated 10b-5 by downplaying the find and painting a misleading and deceptive picture of the drilling progress. The court further noted that government intended to prohibit any misleading financially oriented statements made by or on behalf of corporations—irrespective of whether the corporation had any ulterior purpose in making the statement or whether it specifically intended to mislead. This is simply because a misleading statement of material information can seriously injure the investing public.

The appellate court sent the case back to the district court for further fact-finding on whether the release was indeed misleading. The district judge ultimately ruled that the news release was misleading and that it violated Rule 10b-5. These findings were upheld on a second appeal. TGS contended that the finding of a 10b-5 violation for mere negligence in the issuance of the press release infringed upon its First Amendment rights. But the court disagreed, holding that the corporate release on drilling operations was a kind of finance-related category of expression similar to securities registration statements and prospectuses.<sup>65</sup>

Since *Texas Gulf Sulphur*, dozens of other 10b-5 cases have reached the courts based on allegations that corporate news releases were misleading. Disgruntled investors, rather than the SEC, have initiated most cases. Corporate communications professionals often are in a precarious position of having to decide exactly when to release news, making sure that it is neither too early nor too late. As shown elsewhere in this book, the First Amendment generally provides full protection to statements that may downplay or exaggerate news or may in some other way be misleading. But there are some exceptions, and corporate financial speech is one of these.

## PROTECTING THE POLITICAL PROCESS

Courts have declared many times that corporate *political* speech, unlike corporate financial-oriented speech, lies at the very heart of the First Amendment and generally deserves the utmost protection. Yet corporations also have been viewed with disdain and suspicion by many who fear that big companies are capable of dominating the nation’s marketplace of political expression and corrupting



the democratic system. Therefore, corporate political speech has been the target of many legislative restrictions, and the courts have upheld some of those restrictions.

The greatest concern about corporate political speech has centered on the ability of corporations to give large sums of money directly to selected political candidates or to use corporate funds to purchase advertising on behalf of candidates. This double-edged concern involves what the law calls *political contributions* and *independent expenditures*. A political contribution is a direct donation of money or some other asset to a candidate's campaign. The candidate, or the candidate's campaign committee, determines how the donation will be used to further the candidacy.

An independent expenditure, in contrast, is not given to or coordinated with the candidate. Rather, the corporation independently spends money for a communication that advocates the election—or defeat—of a particular candidate. An example would be a TV commercial urging voters to “Elect Jefferson Smith to Senate,” if the commercial were sponsored, written, and produced by a corporation without direction from the Smith campaign. News stories or commentaries run by *media* corporations, however, do not count as independent political expenditures subject to regulation.

### **Campaign Reform Statutes**

Federal regulation of campaign financing dates back to the late 1800s. Initially the concern being addressed was candidate solicitation of government employees—a practice that tended to politicize all ranks of government and to create a spoils system. By the time of Theodore Roosevelt's election the focus had shifted to corporate contributions and gifts. The first statute banning corporate contributions was crafted in 1907. A more extensive bundle of legislation, the Federal Corrupt Practices Act of 1925, served as the foundation for all federal campaign rules for nearly fifty years.

In 1971 Congress enacted the comprehensive Federal Election Campaign Act (FECA),<sup>66</sup> an intricate package of legislation intended to curb corruption—and perceived corruption—in all phases of the increasingly expensive federal election process. The stringent law altogether prohibited most corporations from using their corporate funds to make contributions to candidates or to make independent expenditures advocating for or against candidates. Corporations were allowed to make limited, partisan communications to their own stockholders and executive personnel,<sup>67</sup> but they could not use corporate funds to advise the general public how to vote—obviously a significant restriction on speech. A 1974 amendment to FECA created the Federal Election Commission (FEC), an entire federal agency that enforces the act and enacts supporting regulations.

The states have enacted their own campaign reform laws to cover statewide and local campaigns. Many of the state laws are modeled closely after

FECA and likewise prohibit corporate campaign contributions and advocacy expenditures.

### ***The Courts Weigh In***

The U.S. Supreme Court took its first look at the FECA—and first began pulling the reins in on campaign laws—in the 1976 case of *Buckley v. Valeo*.<sup>68</sup> The case challenged the constitutionality of many FECA limits as they applied to individuals. The Court held that contribution and expenditure limitations indeed implicate fundamental First Amendment rights, noting that the quantity and depth of expression, along with the size of the audience reached, all would be negatively affected by spending limits. The Court therefore employed strict scrutiny to determine whether the restrictions were narrowly drawn to prevent real problems of corruption or the appearance of corruption. To the extent that political contribution limits appeared necessary to accomplish those compelling anti-corruption goals, they were upheld. But restraints motivated merely by a desire to equalize voices were deemed unconstitutional. The *Buckley* case concerned only the FECA limitations on individuals. But it set the stage for a string of later cases that considered the restraints on corporations.

In general, total bans on *corporate* campaign contributions and advocacy expenditures have been upheld. A key decision came in 1990 when the Supreme Court upheld the Michigan expenditure prohibition in *Austin v. Michigan Chamber of Commerce*. The central issue in the case was whether it is constitutional for government to prohibit a private, nonprofit corporation—the state Chamber of Commerce—from making an independent expenditure on behalf of a political candidate. The Court acknowledged, as it had in *Buckley v. Valeo*, that a statute prohibiting or limiting independent expenditures for candidates does indeed burden free expression—in this case, corporate expression. But the Court nevertheless found that the prohibition was supported by a compelling state interest in avoiding corruption or the appearance of corruption. Wrote Justice Marshall for the majority:

State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace." . . . We therefore have recognized that "the compelling governmental interest in preventing corruption supports the restriction of the influence of political war chests funneled through the corporate form."<sup>69</sup>

Thus a major restraint on the kind of political expression most often declared to be at the core of the First Amendment was declared constitutional in order to protect another key to democracy—elections free of corruptive influence.

The Supreme Court has, however, invalidated these campaign expenditure bans as applied to nonprofit, *ideological* corporations that are not funded by business corporations. These ideological corporations obtain contributions from donors or members for the specific purpose of promoting a particular message such as right to life, right to choice, civil rights, or animal welfare. Such organizations often distribute communications urging support for certain candidates. In most other corporate political expenditure cases, the justifications for a ban are to reduce the corrupting influence of political war chests built with corporate assets and also to ensure that general-purpose corporate treasuries are not diverted for political purposes against the wishes of investors. With ideological corporations, though, these justifications do not apply. Such corporations do not pose the same danger of corruption or misuse of corporate funds because they are formed specifically to disseminate political ideas, not to amass capital and increase equity of investors.<sup>70</sup> However, the rulings in favor of nonprofit ideological corporations apply only to their independent political expenditures; direct campaign contributions by such corporations remain prohibited by FECA and state statutes.

You may be aware that some business corporations do indeed make contributions directly to candidates in elections. This is done through a Political Action Committee (PAC), or what the FECA calls a *separate segregated fund*. These are not actually corporate funds. A corporation may establish, administer, and solicit contributions to a PAC, and the PAC is free to make partisan expenditures and contributions within the contribution limits set by statute.<sup>71</sup> But no portion of the actual political fund may come from the corporate treasury; it must be solicited separately from its individual stockholders or administrative personnel.

### ***Corporate Speech on Public Issues***

Thus far we have looked at the long-established bans on corporate contributions to *candidates* or expenditures on behalf of *candidates*. But what about corporate political spending aimed at public issues? In many local and state jurisdictions an issue may be formalized as a ballot measure and put to a public vote as a referendum or initiative. Do corporations have a First Amendment right to use their assets to influence thinking on such issues?

The Supreme Court has spoken definitively on this question. In the 1978 case of *First National Bank of Boston v. Bellotti*, the Court distinguished corporate spending on candidates from spending on issues. The Court said that the latter did not offer the same opportunity for corruption of public officials. Therefore, with regard to public issues, a sufficiently compelling reason for restricting corporate expression was absent.

At issue in *Bellotti* was a Massachusetts law that prohibited corporations from making contributions or expenditures for the purpose of influencing the vote on any ballot measure other than one directly affecting the assets of the corporation. The Court began its analysis by noting that speech that would otherwise fall within the First Amendment's protection does not lose that protection simply because its

source happens to be a corporation speaking out on issues that do not directly affect its assets. Rather, the question is whether the state has justifications so compelling as to override that protection. The Court wrote, “The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it.”<sup>72</sup>

### ***McCain-Feingold and the First Amendment***

After years of debate, Congress in 2002 enacted the Bipartisan Campaign Reform Act (BCRA),<sup>73</sup> an extensive and complicated set of amendments to FECA. The reforms were prompted by continually escalating campaign spending and perceptions of undue organizational influence and abuse, including the rise of so-called “soft money” flowing unchecked through political parties rather than directly to candidates. The act is often referred to as the McCain-Feingold law, after its two main sponsors in the U.S. Senate. But in some ways BCRA seemed to disregard years of First Amendment guidance from the Supreme Court. On the very day that BCRA became law another senator, Mitch McConnell, filed a lawsuit challenging its constitutionality.

The most controversial part of McCain-Feingold was its strict prohibition on corporate “electioneering communications.” These were initially defined as any broadcast, cable, or satellite communications that *referred to* a candidate for federal office, were aimed at the electorate, and aired within thirty days before a primary election or sixty days before a general election. The law, which made it a crime to distribute such communications, was intended to close a perceived loophole for messages that are clearly designed to sway an election but which don’t expressly advocate for or against a candidate, thereby avoiding the expenditure ban. But the ban thereby also severely limited a corporate entity’s constitutional right to engage in general political speech about public issues.

In *McConnell v. FEC* the Supreme Court upheld BCRA’s ban on corporate electioneering communications against a claim that the law, on its face, violated the First Amendment.<sup>74</sup> Though the Court said the law was not necessarily unconstitutional, it left open the possibility that particular *applications* of the law could be held unconstitutional, depending on the extent to which government attempted to block legitimate expression on public issues. The Court clearly was stretching in an effort to save the electioneering provision of BCRA. But the Court left itself in a difficult position, facing a possible slippery slope of government intrusion into political expression and likely a steady stream of difficult line-drawing cases.

### ***Hillary: The Movie***

As this book goes to press the key First Amendment case to watch was the high-profile, high-stakes *Citizens United v. FEC*. Citizens United, a nonprofit corporation

advocating “traditional values,” produced a feature-length documentary movie titled “Hillary: The Movie,” which was a highly critical look at then-Senator Hillary Clinton. The organization wanted to air the movie on cable TV during the 2008 presidential primary season in which Clinton was campaigning against Barack Obama. But because Citizens United was funded to a small extent by corporate contributions, it was subject to the anti-electioneering provision of BCRA. And even though the movie was not a campaign ad of the sort traditionally envisioned by the campaign reform laws, a federal district court held that under BCRA the movie amounted to electioneering and could not be shown on TV.

The case reached the U.S. Supreme Court. Citizens United argued that its movie was a critical biographical assessment of Senator Clinton’s public record and that the mere possibility that voters, after they view the film, might choose to factor its information into their voting decisions cannot transform the documentary into a direct appeal on how to vote. More boldly, Citizens United urged the Court to reexamine its *Austin* case precedent because it is at odds with “the well-established principle that First Amendment protection does not depend upon the identity of the speaker.”

The Court was expected to release a decision on the Clinton movie during its usual end-of-term flurry of rulings in June 2009. In a highly unusual move, however, the Court announced that it would rehear arguments at a special September session of the Court. The justices directed both Citizens United and the government to file supplemental briefs addressing this one question: For the proper disposition of the case, should the Court overrule *Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC*?

## WAIVER OF FREE SPEECH RIGHTS

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Under certain circumstances, individuals may effectively waive, or relinquish, their constitutional protections—including the protections of the First Amendment. Fundamental constitutional rights, such as the right to freedom of speech, are never relinquished involuntarily, however. A waiver can occur only through some voluntary action or agreement by the individual. And if the facts are unclear, the judicial presumption is that a waiver of rights has not taken place.

In some cases, a waiver of First Amendment freedom may occur when an individual accepts government benefits, knowing in advance that they come with strings attached. Government may not condition its benefits upon a complete relinquishment of a constitutional right in all facets of a person’s life. However, it may stipulate restrictions on how the benefit will be put to use. Once individuals proceed to accept such benefits, they have agreed implicitly to the terms and cannot at the same time challenge the restrictions.

In 1991, for example, family planning clinics and physicians who received government funds under the Public Health Service Act challenged government regulations that prohibited the funds from being used to support abortion counseling or advocacy. In a 5–4 decision, the Supreme Court in *Rust v. Sullivan*<sup>75</sup> held that the restriction did not violate the First Amendment. Doctors and clinic staff members were not generally prohibited from engaging in abortion counseling or advocacy, the Court majority said. Rather, the rule simply prohibited the public funds from being spent for those purposes. The clinic staffers and doctors could continue speaking freely on abortion—as long as it was done through avenues or programs separate from those that voluntarily use the government funds.

In contrast, the Supreme Court in *FCC v. League of Women Voters of California*<sup>76</sup> invalidated a federal law that provided that noncommercial television and radio stations that receive federal grants may not “engage in editorializing.” Here, too, the justices split 5–4, though the decision went the other direction. Under the federal regulation, a recipient of funds was barred absolutely from all editorializing as a condition for receiving funds. In effect, the law meant that an educational station that received just 1 percent of its overall income from federal grants was nevertheless completely prohibited from airing editorials. The Court ruled in the 1984 case that the government’s ability to condition its funding did not extend that broadly.

Another way in which First Amendment rights may be voluntarily relinquished is by agreeing to restrictive provisions in a government employment contract. In a couple of cases, the federal government has successfully used employment agreements to prevent former CIA employees from revealing agency information in books. The courts deemed these restrictive agreements reasonable and upheld them, even without a showing that the former CIA employees’ writings would contain secret or dangerous information. The agents had signed the agreements when they were first hired.<sup>77</sup>

## Summary Points

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**The First Amendment to the U.S. Constitution** is a single sentence that must be interpreted by the courts in order to have any meaning in real conflicts.

**It is not clear exactly what the founders** intended when the First Amendment was drafted, but at the very least they intended to prevent a central government from imposing prior restraints such as licensing and censorship schemes, as the Crown had done in earlier decades.

**The leading advocates of free speech** in the new nation saw it as a natural, fundamental right of individuals and also as a functional social policy, necessary to the operation of a democracy.

**Since 1925 the First Amendment** guarantees have served as restrictions on all government—local, state, and federal.

**In recent decades, the U.S. Supreme Court** has interpreted the words speech and press broadly to cover all methods of expression, but protection does not apply to pure conduct.

**Although direct prior restraint on content** is the least tolerable form of interference in speech, after-the-fact penalties, well-meaning access rules, and even restrictions not based on content may be abridgments of speech.

**Though the First Amendment's guarantees** are stated in absolute terms, courts have always allowed some government interference in expression. Speech rights may be outweighed by competing interests in a given situation, and they are limited by some categorical exceptions to constitutional protection.

**No regulation can withstand First Amendment scrutiny** if it restricts more communication than necessary to achieve its purpose; if a less restrictive alternative is available, the law is overbroad.

**In the chapter Hypothetical,** the public college's conduct code is actually a *speech* code, at least in part, and despite its good intentions it is likely to be found unconstitutional. As we've seen, even vulgar words usually are fully protected expression under the First Amendment. If the *Daily Drumbeat* operates as a student forum on campus, then the president's threat to shut it down, based on content, also is unconstitutional. The city's newsrack ordinance might be legal, if crafted as a valid time/place/manner regulation. But the circumstances of enforcement in this scenario are highly suspect. The business owner's action, though a form of theft, is not a First Amendment issue because it's not a government action.

## Discussion Questions

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1. If the U.S. Supreme Court did adopt an absolutist approach to the First Amendment, what are the worst consequences that might realistically result from that decision? How, realistically, might society benefit from an absolutist approach to free speech?
2. In today's mega-media society, are there any serious flaws in the marketplace-of-ideas, discovery-of-truth justification for freedom of speech?
3. What, exactly, should be the dividing line between speech and conduct? Is topless barroom dancing speech or conduct? How about simply posing topless in the bar? If posing topless or naked is not considered speech, would a videotape of the posing be considered speech? Would it matter how the tape was made? What if the tape were recorded by a stationary camera with no

creative human control? Should playing the tape still qualify as an inherent form of expression?

4. The courts have long distinguished between prior restraints on speech and subsequent punishments, the latter being more likely to be upheld. Might this distinction be entirely illusory? What is the practical difference between a statute prohibiting false advertising and a court injunction ordering a magazine not to publish a particular ad because of its false content? In *Near v. Minnesota*, the injunction against the paper was considered a classic form of prior restraint and a particularly bad form of speech abridgment. But is there any practical difference between the injunction and the general statute? In both cases, violation will result in some form of punishment. Would the injunction have a more chilling effect on advertising than the statute?
5. The mass media are sometimes criticized for hiding behind the First Amendment when they behave in an ethically questionable fashion. Some media consumers indeed harbor doubts as to whether the amendment is a particularly beneficial device in modern society. How, specifically, might the mass media better educate and convince the public of the merits of the First Amendment?

## Key Terms

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absolutist	public forum
compelled speech	rational basis standard
compelling interest	sedition libel
content-neutral	standard of judicial review
doctrine of incorporation	state action
doctrine of overbreadth	strict scrutiny
expressive conduct	substantial interest
intermediate scrutiny	symbolic speech
natural law	time, place, and manner (TPM)
preferred position balancing	restriction
prior restraint	void-for-vagueness doctrine



## CHAPTER THREE

# Risks to Public Safety



*After completing this chapter, you should*

- **Know** how the Supreme Court's clear-and-present-danger test evolved and how the modern version of that test is applied.
- **Appreciate** the legal issues involved when national security is jeopardized by mass communication.
- **Understand** how communicators may become civilly liable when individuals suffer physical harm as a result of media content.
- **Be** able to analyze a given set of facts for legal danger signs of criminal or civil liability.

## WHEN TO CENSOR?

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If speech is ever to be justifiably curtailed or punished despite the First Amendment, perhaps the most likely time would be when speech directly causes physical harm—or creates a high risk of such harm. That could occur, for example, if speech caused fighting or widespread civil disobedience, if it compromised

## Hypothetical

### Rattlesnake Militia and the Nightmare Video

You are an editor for *iClassified.com*, a controversial website that collects secret or “classified” documents and videos from anonymous uploaders around the world and posts the materials for anyone to see. You publish materials gleaned from all kinds of organizations—corporations, governments, crime networks.

One afternoon a user uploads a shocking nine-minute video that you must decide to either block or let go public. It’s a tough call. The video shows three members of the Rattlesnake Militia, a domestic terrorist group, brutally interrogating a hostage. The hostage is a staff consultant to the House Committee on Homeland Security. The three men dunk the hostage’s head under water, time and again, to the brink of drowning, and then demand answers to detailed questions about U.S. cybersecurity. Near the video’s end, the hostage is heard wearily describing the secret location of a massive Internet server farm and government energy facility. This is followed by a celebration scene, of sorts, with the three terrorists hooting about their intelligence bonanza and vowing to bring down the world.

You’re aware that the state in which you work has passed a law that reads in part as follows:

It shall be a felony for any person to publish or broadcast a communication which is likely to be understood by some members of the audience as a direct or indirect encouragement to commit or prepare acts of terrorism. Communications assumed to violate this section include any communications that glorify terrorists or terrorist acts.

Lots of questions go through your head. But in keeping with your website’s stance on open information, you place the video online.

In little more than an hour, the U.S. Justice Department calls and demands that you take the video down. It reveals secret government information that could lead to lives being endangered, they say.

Then police arrive with a warrant for your arrest. You are charged with violating the terrorist anti-glorification act.

And as if this weren’t enough, a week later you get more bad news: Two fourteen-year-old boys who saw the video tied up a younger boy and recreated the dunking torture, only this time with fatal consequences. The parents of the drowned boy say they’re suing you and the website for the wrongful death of their son.

What defense(s) can you offer? Do you have any legal legs to stand on?

military secrets such that troops or entire cities were put in danger, or, on a smaller scale, if it created circumstances in which individuals might injure themselves or others while acting upon information in the media.

Many forms of private, person-to-person communication have long been deemed illegal conduct and not protected speech because of their direct likelihood to create panic, lead to physical violence, or lead to financial ruin. These include, for example, direct death threats, conspiracies to commit murder, and fraudulent inducement to enter a contract. But our concern here is more public forms of expression and whether they, too, may be deemed censorable or punishable if they risk dangerous results.

This chapter explores this question by examining historical attempts by government to prevent insurrection and, later, more recent cases in which private people have sued the media for harm sustained. What many of these cases have in common is judicial application of the so-called clear-and-present-danger standard to determine whether the expression has created too great a risk.

## LAW AND ORDER

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Freedom of speech became a point of controversy quite early in this nation's history, when Congress passed the **Sedition Act** of 1798. The law made it a crime, punishable by up to two years' imprisonment, to publish "any false, scandalous and malicious writing" with intent to stir up contempt for the federal government, government officials, or their official acts. Many political leaders, including James Madison, believed the law violated the First Amendment, either because it punished free discussion of government and politics or simply because it infringed on the states' rights to regulate expression.

The Sedition Act was vigorously enforced to punish opponents of the Federalist-controlled government. About two dozen editors and a number of private citizens were prosecuted. The Sedition Act expired by its own terms in 1801, however, and the new president, Thomas Jefferson, pardoned all people convicted under the act.

By today's standards, the Sedition Act would appear to have been a patent violation of the First Amendment. The constitutionality of the act, however, was never tested in the U.S. Supreme Court, and the zealous prosecutions show that First Amendment protection can be illusory in the absence of strong backing by the courts.

The Supreme Court did not begin to interpret the scope of First Amendment protections for more than one hundred years—until the time of World War I. This is not to say that freedom of speech was unhindered by government during the interval. Most government suppression of speech was at the state level, where the First Amendment did not apply. (Remember, the First Amendment guarantees were not made applicable to the states until 1925.) But the federal government also engaged in some control and punishment of speech.

The period leading up to and during the Civil War was particularly troublesome. For example, many Southern states feared that antislavery speech

could bring down the institution of slavery, so they placed harsh restraints on abolitionist expression. These official restraints were exacerbated by unofficial acts of intimidation, violence, and censorship. And during the war, which was not uniformly popular in the North, the Lincoln administration maintained an official censorship policy requiring newspaper journalists to first clear their accounts of the war through an army telegraph censor.

## CLEAR AND PRESENT DANGER

Finally, in 1919 the Supreme Court began giving form and life—and, eventually, strength—to the First Amendment. The first in a series of World War I cases was *Schenck v. United States*.

Congress had enacted the **Espionage Act** of 1917 after declaring war against Germany. The act said in part that

. . . whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment Service of the United States . . . shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.

Schenck was convicted under the act for sending to drafted men pamphlets that urged insubordination in the armed services and obstruction of the draft. The Supreme Court unanimously upheld the conviction and legally established a First Amendment exception for such dissident expression. The opinion, by Justice Oliver Wendell Holmes, explained the court's reasoning and constitutional standard:

The character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.<sup>1</sup>

Thus the **clear-and-present-danger** test—an attempt to define the point at which speech comes close enough to triggering serious harm that it loses First Amendment protection—was born. The legal debate had just begun, however. The Espionage Act was amended in 1918 to include many other kinds of speech that could be punished, including “any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution

of the United States, or the military or naval forces of the United States, or the flag of the United States.” Criticizing the unpopular war or government institutions became extremely hazardous. More than 2,000 prosecutions took place under the Espionage Acts of 1917 and 1918, and almost 900 people were convicted. This, in turn, led to many more appellate challenges, several of which reached the U.S. Supreme Court.

The clear-and-present-danger test was not always followed at first, but later cases further refined it and clearly established it as the constitutional standard for government restraints of this kind. A 1927 case, *Whitney v. California*, is noted in particular for the articulate concurring opinion of Justice Louis Brandeis, which was joined by Justice Holmes. Brandeis argued in spirited detail for a clear-and-present-danger standard that would assure greater latitude for free expression:

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . . Even advocacy of violation [of the law], however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon. . . . In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated. . . . Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution.<sup>2</sup>

So, in the increasingly sophisticated views of Justices Holmes and Brandeis at least, the standard should require a reasonable fear of serious and imminent danger caused by incitement before speech could be suppressed. Despite this more liberal view of two of the justices, however, the Court voted unanimously to uphold the conviction of Charlotte Whitney, under the California Criminal Syndicalism Act, for her active membership in the pro-violence Communist Labor Party. As a whole, the Supreme Court was not yet ready to adopt the more liberal standard articulated by Brandeis. Nevertheless, top legal authority was clearly turning toward expanded freedom for political dissent.

The Supreme Court in the mid-1900s entered an era during which sedition convictions were overturned as often as they were upheld. The World War II years and the Cold War era that immediately followed brought another wave of anti-sedition legislation in the states and at the federal level. The main federal statute was the **Smith Act** of 1939, which had outlawed speech that advocated

either forceful overthrow of the government or disloyalty among members of the military. As it turned out, Smith Act prosecutions were very rare during the war. This was due largely to the fact that Americans, having suffered the devastating surprise attack at Pearl Harbor, were much more united in support of the war effort than they had been in World War I.

After World War II, however, the Cold War tension between Western democracy and Soviet communism brought years of suspicion, fear, and suppression of socialist views in this country. Suddenly the Smith Act rose to prominence as a vehicle for prosecuting Communist party members in America. By the late 1950s, more than 140 people had been indicted under the act. A number of convictions were reviewed by the Supreme Court, with some upheld and some reversed.

Smith Act prosecutions came to a virtual halt in 1957, however, following the Supreme Court's opinion in *Yates v. United States*.<sup>3</sup> In that case fourteen members of the Communist party in California had been convicted under the Smith Act for conspiring to advocate violent overthrow of the government. The Supreme Court reversed the convictions, ruling that the prosecution had failed to distinguish between the mere advocacy of abstract doctrine, which is protected speech, and the advocacy of specific, illegal action. The government concluded that it could rarely meet that tougher standard of evidence, and most of the pending Smith Act prosecutions were dismissed. A majority of the Supreme Court never deemed the Smith Act itself to be unconstitutional, however; it simply narrowed the statute's application. The Smith Act remains on the books.<sup>4</sup>

## THE INCITEMENT STANDARD

The foregoing discussion compressed drastically a great deal of legal history and philosophical struggle. The important lesson is to appreciate how the Supreme Court, through years of case opinions, carved out an exception to freedom of speech and then refined it by slowly adjusting and clarifying the line between protected expression and that which could be punished. It is also important, of course, to know the Supreme Court's current standard in these kinds of cases, which is stated in the 1969 case of *Brandenburg v. Ohio*.

In *Brandenburg*, a Ku Klux Klan leader had made a speech at a rally, and the episode was filmed by a TV news crew. The Klan leader made highly derogatory remarks about African Americans and Jews and then in his speech said: "If our President, or Congress, or Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [*sic*] taken." In all, the film showed twelve hooded figures at the rally, some of whom carried firearms. The Klan leader was convicted under the Ohio Criminal Syndicalism statute for advocating "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."



### The Brandenburg Incitement Test

- Does the expression advocate the use of illegal force or violence?
- Is it directed toward actually inciting such illegal conduct?
- Would the advised conduct be imminent, or immediate?
- Is the expression actually likely to produce that illegal conduct?

Was the conviction constitutional? The Supreme Court said no, and in so doing further extended the scope of First Amendment protection. After analyzing its own precedent, the Court ruled that a new standard had evolved and stated it succinctly as follows:

The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.<sup>5</sup>

Does this sound familiar? More than forty years earlier, Justice Brandeis had argued that the clear-and-present-danger test should mean incitement of likely and imminent danger. Now in *Brandenburg* the full Court had distinctly recognized that view as the constitutional standard. Even presuming that the Klan leader had called for specific action rather than mere adoption of abstract doctrine, that would no longer be sufficient to convict. The speech remains protected until the point when it is actually *likely* to incite unlawful action. Not only did the Supreme Court reverse the *Brandenburg* criminal conviction, but it also invalidated the underlying Ohio statute.

This modern interpretation of the clear-and-present-danger test, sometimes referred to as the **incitement standard**, was reinforced by the Supreme Court in 1973. In May 1970, about 150 antiwar demonstrators had moved from the campus of Indiana University into a public street and blocked traffic. A group of law enforcement officers dispersed the demonstrators by walking up the street. As the sheriff passed, one of the demonstrators standing at the curb said to other demonstrators and onlookers nearby: “We’ll take the fucking street again.” The demonstrator was arrested and convicted under the state’s disorderly conduct statute.

The Supreme Court held that the statute had been applied in this case only to punish spoken words, not conduct, so constitutional guarantees were at issue. The Court then recited its *Brandenburg* test and concluded that the demonstrator’s words did not fall within the narrowly limited class of speech that could be punished: “At worst, [the words] amounted to nothing more than advocacy of illegal action at some indefinite future time.”<sup>6</sup>

Expression that threatens to seriously disrupt the safe functioning of government, then, is one of the classic, long-presumed exceptions to First Amendment

protection. The standard developed to determine the boundaries of this excepted class of speech was the clear-and-present-danger standard, which has evolved over several decades into the stricter incitement test, thus narrowing the exception and putting a greater burden of proof on the government when it seeks to punish speech. Over the decades the Supreme Court has also strengthened the role of judicial inquiry, giving less deference to the judgments of legislative and executive branches of government when First Amendment rights are at stake.

The incitement test of *Brandenburg v. Ohio* is not the standard used to settle all First Amendment conflicts. The standard was designed for those situations in which dangerous, illegal conduct was being advocated generally, for political purposes, and in which government wanted to prevent or punish such expression. As discussed later in this chapter, lower courts in recent decades have employed the incitement test in some other kinds of cases, such as personal tort cases where plaintiffs allegedly suffered physical injury as a result of faulty instructions or some other kind of speech. But the incitement test has been applied inconsistently and sometimes awkwardly in those civil cases for which the test was not designed.

## NATIONAL SECURITY

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Even in a democracy, the government must be allowed to maintain certain secrets in order to effectively ensure the nation's safety and security. Most people would concede, for example, that the identities of undercover narcotics agents or the location of troops during wartime are legitimate secrets. On the other hand, government often has a tendency to be too secretive and too controlling—sometimes just to avoid embarrassment or hinder opposition.

As mentioned in Chapter 2, the First Amendment as interpreted does not generally empower communicators to open the doors of government. But what if, through inside sources or your own observation, you discover secrets that you think should be made public? May the government intervene? Think back to the chapter Hypothetical, for example. What transpired regarding the breach of government cybersecurity might be important for the nation to know. Which should win, your right to judge for yourself and publish freely, or the government's demand that you cease publication?

National security would seem to be a logical justification for government restrictions on publication. Especially in today's tense world of increasingly sophisticated and lethal weapons technology and terrorist threats, most constitutional law experts presume there must be some First Amendment exception to allow punishment or censorship of mass communications that would threaten national security. Little agreement or legal authority exists, however, regarding the boundaries of that exception.



This developing area of First Amendment law may unfold further in the decades ahead. Currently, instructive decisional law is virtually nonexistent where the issue is sanctions or restraints directly against the mass media, as opposed to restrictions on government employees who might be tempted to write books or leak information to the press. Just two modern cases have raised this issue, and only one of them reached the Supreme Court. Even in that case, the fractured Court published nine separate opinions that failed to establish one guiding standard. Though the boundaries of the national security exception remain problematic, it is instructive to examine these two cases.

## THE PENTAGON PAPERS CASE

The Pentagon Papers case of 1971, formally titled *New York Times Co. v. United States*, started when a consultant who had worked for the Pentagon on an extensive, classified history of the Vietnam War leaked copies of the secret manuscript to both the *New York Times* and the *Washington Post*. The study was titled *History of U.S. Decision-Making Process on Viet Nam Policy*, and it dealt with a war in which the nation was still engaged. As soon as the two newspapers began to publish their planned series of excerpts from the document, the Justice Department sought restraining orders against further publication, claiming that national security was at stake.

The opinion in *Near v. Minnesota* decades earlier had acknowledged that threats to national security were not protected by the First Amendment and might even be subject to prior restraint. But this was the first time the government had ever sought a federal court order to prevent publication. At the lower court levels, the government's effort to enjoin publication met success in New York, but in Washington, D.C., its requests for a restraint against the *Post* were denied.

The issue posed a historic First Amendment clash of utmost significance—and of some urgency. If the Nixon administration's argument was correct, the *Post* was about to publish information that would endanger national security. If the restraining order was not justified, however, the *Times* was being subjected to flagrant political censorship each day that passed. Recognizing the gravity of the situation, the U.S. Supreme Court granted immediate review of the cases and reached its decision just two weeks after the controversy first arose.

The official opinion added little guidance to this area of First Amendment law, however. In a brief, unsigned opinion, the Court simply said that the government “carries a heavy burden of showing justification” for prior restraints and that it did not meet the burden in this case. So the papers were free to publish. The vote was 6–3. This brief opinion was followed by nine separate concurring or dissenting opinions, with the justices exhibiting a wide variety of reasoning. Here is a sampling.

Justice Douglas took the absolutist approach to the First Amendment:

It should be noted at the outset that the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech or of the press." That leaves, in my view, no room for governmental restraint on the press.<sup>7</sup>

Justice Brennan favored a balancing approach, but concluded that in this case the government had not met the necessary standard of proof:

The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture. . . . Only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.<sup>8</sup>

Justice Marshall focused on the lack of federal legislation authorizing prior restraints for national security reasons:

It would . . . be utterly inconsistent with the concept of separation of power for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit.<sup>9</sup>

Justice Potter Stewart, in a concurring opinion joined by Justice White, was the only member of the Court to suggest a specific test for deciding such cases. He wrote:

I cannot say that disclosure of any of [the documents] will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us.<sup>10</sup>

In dissent, Justice Harlan favored a policy of greater deference to judgments of the executive branch on matters of foreign affairs:

It is plain to me that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests.<sup>11</sup>

The government never attempted to prosecute the newspapers after the series had run, though under some federal statutes a case might theoretically have been fashioned. Also, several justices hinted in the Pentagon Papers case that subsequent punishment under appropriate criminal statutes might be constitutionally

permissible. Ultimately, it appeared that the government in this case had been more concerned about preventing embarrassment than about protecting national security, strictly speaking. The document, after all, detailed past wartime decision making (much of which was of questionable quality) that had occurred some three to twenty years previously.

## THE H-BOMB CASE

Probably the closest this nation has come to stopping publication on the basis of national security was the 1979 case of *United States v. Progressive, Inc.*, though outside developments essentially dissolved the conflict before it could reach the appellate courts. The case arose when a freelance writer for the *Progressive* magazine, a political journal, completed an article describing in detail the design and operation of a hydrogen bomb. Prior to publication, a copy of the article was sent to the U.S. Department of Energy with a request that the department verify the accuracy of the technical information. But the government decided instead that portions of the article should not be published.

The author and his editors claimed that all information in the article came from unclassified, public sources and would convey no secrets. The government nevertheless argued that the article was dangerous because it connected and explained various H-bomb concepts in a manner not available in the public realm. It claimed that portions of the article must be classified as “restricted data” under the Atomic Energy Act, and the government went to federal court to stop publication.

The District Court, after wading through stacks of affidavits containing complex scientific information, decided to issue the preliminary injunction. The court, groping for some specific test, concluded that the government had “met the test enunciated by two Justices in the *New York Times* case, namely, grave, direct, immediate and irreparable harm to the United States.”<sup>12</sup> The judge’s opinion stated in part:

Does the article provide a “do-it-yourself” guide for the hydrogen bomb? Probably not. . . . One does not build a hydrogen bomb in the basement. However, the article could possibly provide sufficient information to allow a medium-size nation to move faster in developing a hydrogen weapon. It could provide a ticket to bypass blind alleys. . . . What is involved here is information dealing with the most destructive weapon in the history of mankind, information of sufficient destructive potential to nullify the right to free speech and to endanger the right to life itself.<sup>13</sup>

The *Progressive* promptly announced it would appeal, and the nation’s news media began bracing for an ultimate, landmark ruling that many feared would restrict freedom of the press. Unlike the Pentagon Papers case, which was

based on a general claim of a threat to national security, this case was based on a specific federal statute. And unlike the Pentagon Papers case, this one involved a technology still sought by many countries, not a purely historical document.

The higher level of legal precedent never materialized, however. In the months before an appeal could be heard, two other writers compiled H-bomb articles similar to the one that had been enjoined. These articles began appearing in newspapers, and soon the government's preliminary injunction against the *Progressive* became pointless. The government dropped its case before any further legal proceedings could be held. And here again, no attempt was made to prosecute the media following publication.

## WARTIME ACCESS RESTRICTIONS

Restrictions that *have* been imposed in the name of national security, to date without a successful court challenge, are controls on media access to actual military operations. As later chapters will show, this is in keeping with the general rule that the First Amendment does not guarantee a right of access to newsworthy information, but only the right to communicate it after it is learned. Nevertheless, news media have complained bitterly in the years since the Vietnam War that the military's controls on war reporting have become increasingly heavy handed and that reporters are being deprived of a traditional freedom to assume the risk of injury and cover the front lines in battle.

News access was prohibited altogether, for example, when U.S. Marines invaded the Caribbean island of Grenada in 1983 to oust a Marxist regime. Numerous media organizations approached the island in private boats but were intercepted by a virtual military blockade and ordered to turn back. One First Amendment lawsuit was filed against the U.S. Department of Defense by magazine publisher Larry Flynt, but because the Grenada press ban had been lifted a few days after the invasion, the federal Court of Appeals declared the case moot and ordered it dismissed.<sup>14</sup>

The debate over battlefield access was renewed in 1991, when the United States military and allied forces launched Operation Desert Storm against Iraq in the Persian Gulf. Shortly before the Gulf War began, the Department of Defense adopted rules governing media coverage. One rule was that combat reporting would be allowed only through selected media "pools," each headed by a military escort. Pool members had to agree to share their products, such as videotapes. Further, pool products were subject to security review checks prior to dissemination to determine whether they contained any "sensitive information."

The Department of Defense declared that the rules were necessary to protect reporters' safety, to prevent the release of information that might jeopardize soldiers, and to avoid having more than a thousand free-roaming reporters physically hamper operations. Media people complained that the Gulf War

restrictions were not for legitimate security reasons and were instead used to limit the nature of information reported to the American public. *The Nation* magazine and several other media filed a lawsuit challenging the restrictions. A federal court ruled the media's claims of harm were too conjectural and dismissed the case.

Then in September 2001, the United States suffered devastating terrorist attacks upon New York City's World Trade Center Towers and the Pentagon in Washington, D.C., and U.S. troops struck back in a war against terrorist forces in Afghanistan. Once again it was notorious magazine publisher Larry Flynt who sued the government, this time seeking a temporary injunction to prohibit U.S. military officials from interfering in the asserted First Amendment right to have his *Hustler* magazine correspondents accompany American ground troops in combat.

In a brief opinion, the federal District Court judge said that the courts might, in an appropriate case, declare a qualified First Amendment right of the press to gather and report news involving U.S. military operations on foreign soil—a right that would be subject to reasonable restrictions. But the judge also said the parameters of that right would depend on the specific circumstances surrounding a real controversy. In this case, the plaintiff had already been granted some access to the rapidly changed events in Afghanistan, and it was possible that Flynt could obtain reasonable access through regular military channels. Therefore, the request for an injunction was denied.<sup>15</sup>

The U.S. Supreme Court has never addressed directly the question of whether news media may be altogether denied access to military operations, consistent with the First Amendment. It is widely assumed that the Court would uphold such restrictions, however, especially if they are related to protecting life or limb. The Court has upheld access restrictions pertaining to many other government-controlled settings, including prisons and military bases. Historically the judicial branch has been inclined to defer to the judgment of military experts on matters pertaining to actual conduct of an ongoing war.

The First Amendment questions were muted in 2003 when the United States again launched major military action against Iraq. Under a new military policy, about 700 journalists were assigned slots in ground units, aviation units, on ships, and in headquarters locations throughout the combat zone. This process of “embedding” journalists in the combat units resulted in considerable access to front-lines details, and the access came with relatively minimal restrictions deemed necessary by commanders for security purposes. In general, the approach seemed to satisfy both the military and the media.

## THE PATRIOT ACT

Just 45 days after the 9/11 attacks, Congress passed an extensive package of legislative reforms called the USA PATRIOT Act (“Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism”). The Patriot Act sparked considerable controversy that continues

to this day. It made it easier for government to obtain search warrants, conduct wiretaps, and collect information about vast numbers of Americans.<sup>16</sup> Among the most unsettling provisions was expanded authority for the FBI to issue National Security Letters demanding that businesses turn over customer records. An accompanying gag provision in turn could prohibit those businesses from disclosing the records demand to affected customers or anyone else.

The constitutional concerns over the Patriot Act primarily relate to the Fourth Amendment's guarantee against unreasonable searches, now arguably permitted by the Act, that amount to proverbial fishing expeditions for evidence. But the First Amendment might also be implicated if government monitoring of individuals' communicative activity, such as library research or Internet queries, would have a chilling effect on expression.

Following considerable debate, the Patriot Act was reauthorized by Congress in 2006, but many sections of the act were rewritten, and civil liberties safeguards were added. The changes were extensive enough to end a number of First Amendment lawsuits that at the time were pending against the act. The Patriot Act experience is a reminder of the difficult balance between liberty and security. And particularly at times of great fear and anxiety, preserving expressive liberty may not be the primary concern when laws are hastily drafted to combat immediate threats.

## PERSONAL INJURY

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In the fifty years between 1919 and 1969, the Supreme Court fashioned and refined the clear-and-present-danger check on prosecutions of speech thought to evoke mass lawlessness. In the 1970s, the nation witnessed two high-profile cases in which information allegedly would threaten national security. But the 1980s were primarily responsible for yet another kind of legal duel involving expression and safety: personal injury claims against the media.

In the area of civil litigation, a substantial portion of the nation's lawsuits are for "personal injury." Typically they are lawsuits by physically injured people against drivers, machinery operators, manufacturers, medical professionals, and others who allegedly caused the harm. In the 1980s, however, the number of personal injury lawsuits against mass communicators—lawsuits claiming that injury or death was traceable to the content of a publication, broadcast, or sound recording—increased.

## NEGLIGENCE VERSUS INCITEMENT

In most kinds of personal injury cases, the legal basis for a lawsuit is a very broad tort called **negligence**. In general usage, *negligence* is simply another word for *carelessness*. In law, it means a failure to exercise the degree of care that

a reasonable person would have exercised under the circumstances—often referred to as a failure to exercise **reasonable care or due care**.

In order to be legally actionable as a tort, three distinct elements must be shown. Thus, the tort of negligence is committed only when

1. The defendant owed a legal duty to use due care (this duty exists whenever there is a reasonably foreseeable risk of direct harm to others).
2. The legal duty was breached (this is the negligent conduct itself).
3. The breach was the proximate cause of the resulting injury.

Stated another way, a negligence lawsuit generally has grounds when there is careless conduct in the face of reasonably foreseeable harm, and the conduct indeed causes that harm.

For example, suppose you were driving along a four-lane highway when the vehicle next to you suddenly swerved into your lane, causing you to run into an embankment and to be injured. In your lawsuit for negligence against the other driver, the key is whether the defendant failed to use due care. You need not prove that the other driver intended to harm you, nor that the other driver thought he probably would harm you. Rather, the test is whether a reasonable driver would have been more careful than this defendant. Negligence might be proved simply by showing that the defendant failed to look in your direction before changing lanes.

When a personal injury lawsuit is based not on conduct but on expression, however, the defendant's First Amendment freedoms enter the equation. A constitutional dimension is added. In such cases, should a showing of mere negligence be enough to win? Or should a First Amendment screen be applied, thus making the plaintiff's burden tougher? For example, should the clear-and-present-danger standard be the applicable test?

In most cases the courts have indeed held that the traditional tort law standard of negligence is insufficient and that the constitutional standard of clear-and-present danger, or specifically incitement, is what must be proved. As justification for the tougher rule, courts often speculate that if mere negligence were the standard, it would (1) create a chilling effect on potentially valuable speech and (2) give rise to a spate of lawsuits based on media content. This area of law is not entirely settled, however, and media liability may depend on the nature of the allegedly negligent message.

## HARM THROUGH IMITATION

In some of the lawsuits alleging media responsibility for death or injury, the harm occurred when something described or shown in the media was imitated by a member of the audience. Sometimes it is the imitator who is harmed; sometimes the imitator causes harm to someone else. These so-called Pied Piper cases are

particularly troublesome for mass communicators because the imitation typically was not an intended result.

### **Video Broadcasts**

For example, the 1981 case of *Olivia N. v. National Broadcasting Co.* arose from a TV broadcast of a film drama titled *Born Innocent*, about the effects of a state-run home on an adolescent girl. As described in the court records:

In one scene of the film, the young girl enters the community bathroom of the facility to take a shower. She is then shown taking off her clothes and stepping into the shower, where she bathes for a few moments. Suddenly, the water stops and a look of fear comes across her face. Four adolescent girls are standing across from her in the shower room. One of the girls is carrying a “plumber’s helper,” waving it suggestively by her side. The four girls violently attack the younger girl, wrestling her to the floor. The young girl is shown naked from the waist up, struggling as the older ones force her legs apart. Then, the television film shows the girl with the plumber’s helper making intense thrusting motions with the handle of the plunger until one of the four says, “That’s enough.”<sup>17</sup>

The lawsuit against NBC was brought by a nine-year-old girl who, four days after the broadcast, was attacked and artificially raped with a bottle by adolescents at a beach. The assailants had viewed and discussed the scene in *Born Innocent*. The lawsuit alleged that NBC should have known, based on studies of child violence, that susceptible people might imitate the crime depicted in the broadcast and that NBC was therefore negligent in broadcasting the scene. Even if that were true, however, the California Court of Appeals ruled that mere negligence was not the proper standard:

[The plaintiff] does not seek to impose a prior restraint on speech; rather, she asserts civil liability premised on traditional negligence concepts. But the chilling effect of permitting negligent actions for a television broadcast is obvious. . . . The deterrent effect of subjecting the television networks to negligence liability because of their programming choices would lead to self-censorship which would dampen the vigor and limit the variety of public debate. . . . If a negligence theory is recognized, a television network or local station could be liable when a child imitates activities portrayed in a news program or documentary.<sup>18</sup>

To win, the court said, the plaintiff would have to show that the program was directed at inciting imminent lawless action and was likely to produce such action—the incitement requirement of *Brandenburg*. Because that could not be shown in this case, the broadcast remained constitutionally protected, and the girl could not win her case against NBC. Of course, the victim could sue the boys who actually assaulted her at the beach, and the government also could prosecute those youths.



In another case from the early 1980s, the programming in question was a stunt performed on *The Tonight Show with Johnny Carson*. A guest on the show, a professional stuntman, announced that he would attempt a stunt that involved dropping through a trapdoor with a noose around his neck. He made it clear, however, that the stunt was dangerous and should never be attempted by members of the audience. Following a commercial break, the stunt was performed successfully, using comic Carson as the subject.

Several hours after the broadcast, a thirteen-year-old boy was found dead, hanging from a noose in front of his TV set. The set was still on and was tuned to the channel on which *The Tonight Show* had appeared. The boy's parents sued NBC but lost, for failure to demonstrate incitement.<sup>19</sup>

In a 1987 case, it was an adolescent's reading of a magazine article that apparently prompted him to commit an act that proved fatal. *Hustler* magazine had published an article titled "Orgasm of Death," which discussed "autoerotic asphyxia"—the unorthodox practice of masturbation while hanging oneself in order to temporarily limit blood supply to the brain at the moment of orgasm. A prominent editor's note stated: "*Hustler* emphasizes the often-fatal dangers of the practice of 'autoerotic asphyxia,' and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method." The two-page article began by noting cases in which the practice had resulted in death. However, it went on to include details of how the act is performed.

A fourteen-year-old boy attempted the practice. The next morning, his body was found hanging by the neck in a closet, with a copy of the "Orgasm of Death" article near his feet. The boy's mother and his closest friend, who discovered the body, sued *Hustler* and claimed the article had implicitly incited the boy to perform the act. A jury agreed and awarded the plaintiffs almost \$200,000 in damages. The federal Court of Appeals reversed, however. Wrote the court:

Even if the article paints in glowing terms the pleasures supposedly achieved by the practice it describes, as the plaintiffs contend, no fair reading of it can make its content advocacy, let alone incitement to engage in the practice. [The plaintiffs] complain that the article provides unnecessary detail about how autoerotic asphyxiation is accomplished. . . . Although it is conceivable that, in some instances, the amount of detail contained in challenged speech may be relevant in determining whether incitement exists, the detail in "Orgasm of Death" is not enough to permit breach of the first amendment.<sup>20</sup>

A different twist on this line of cases is presented by *Zamora v. Columbia Broadcasting System*, a 1979 case in which the plaintiffs argued that it was the cumulative effects of television violence that caused the harm. When he was fourteen, Ronny Zamora shot and killed his eighty-year-old neighbor in Miami Beach. Ronny was convicted of charges stemming from the killing and was imprisoned. Ronny and his parents then sued the TV networks, claiming that the

teenager's problems were caused by negligent, excessive broadcasts of violence to which the boy became addicted and "subliminally intoxicated."

The federal court dismissed the claim, in part on First Amendment grounds. The plaintiffs sought to impose a duty upon broadcasters that was simply undefinable and therefore incompatible with free speech, the court said. "[T]he liability sought for by plaintiffs would place broadcasters in jeopardy for televising *Hamlet*, *Julius Caesar*, *Grimm's Fairy Tales*, more contemporary offerings such as *All Quiet on the Western Front*, and even *The Holocaust*, and indeed would render John Wayne a risk not acceptable to any but the boldest of broadcasters."<sup>21</sup>

A 2002 court decision following similar judicial reasoning arose from a late 1990s high school tragedy. Fourteen-year-old Michael Carneal entered the lobby of a Kentucky high school and shot several of his fellow students, killing three. The parents of his victims sued several video game, movie production, and Internet companies. According to the complaint, Carneal was a frequent user of these media, and the defendants' content "desensitized" Carneal to violence and "caused" him to shoot the students. Plaintiffs claimed the media companies negligently provided harmful content and should be liable. This content included violent interactive computer games, pornographic websites, and a movie in which a student dreams of killing his teacher and classmates.

The federal Court of Appeals held that, under the basic rules of negligence law, there was no specific, foreseeable risk that watching film violence or shooting characters on a video screen would lead to shooting classmates at school. The defendants should not be held responsible to anticipate another, unknown party's intentional criminal act, the court said. Furthermore, the court said that under First Amendment principles it was loath to attach tort liability to the dissemination of ideas and images embodied in the defendants' media products, absent evidence of incitement.<sup>22</sup>

Is there any situation in which excessive detail in entertainment programming, even without incitement, should be the basis for tort liability? For example, in 1990 a ten-year-old boy was arrested in Southern California on suspicion of planting a homemade time bomb in his school restroom. The bomb, which was safely detonated a few minutes before it was set to go off, was made from model rocket engines, batteries, and a digital timer. The boy told the sheriff's deputies that he learned how to make the explosive device entirely by watching an ABC television show, *MacGyver*, though network officials said that was impossible. Suppose the bomb had seriously injured other children, and suppose the TV show actually had provided all the detail necessary for home construction of the device? Should the network be liable? Should the legal standards for a tort claim in this case be significantly different from the standard for obtaining a prior restraint in the *Progressive case*? Cases of this nature are on the horizon, and a few courts have already indicated that the incitement test does not seem entirely appropriate for these kinds of situations.<sup>23</sup>

In 1995 the issue of excessive media detail rose to the level of national debate, this time in the context of news coverage. In one instance the issue grew out of coverage of the Oklahoma City federal building bombing that killed 169 people and injured hundreds more. Some news accounts gave details about how the 4,800-pound homemade bomb was constructed from fuel oil and a chemical fertilizer. Another case, six months after the Oklahoma bombing, involved the fatal derailment of an Amtrak train in Arizona. Some news accounts detailed how the saboteurs loosened nineteen feet of rail, removed a three-foot steel connecting plate, and bridged the gap with wire in order to disable an electronic warning system. Both cases raised the question whether the detailed media accounts would serve to instruct would-be terrorists.

Under any circumstances, could persons injured in a later, copycat attack hold the media legally responsible? From the case law discussed in this segment of the chapter, it appears the answer is no.

## HARM FROM ADVICE OR INSTRUCTION

In the cases mentioned so far, it was not the desire of communicators that members of the audience imitate the depicted conduct. In fact, imitation was expressly discouraged in two of the cases. Sometimes, however, communicators do urge or invite the audience to act in a certain way in anything from a medical advice column to a product instruction booklet to a political editorial. Recall that in the chapter *Hypothetical*, for example, the newspaper editor specifically urged citizens to fast in protest. If the advice leads to harm, are communicators and the media—whether broadcast, recording, print, or online—in a dangerous legal position?

### **Radio and TV**

A classic case in this area, and one often relied upon by plaintiffs, is *Weirum v. RKO General, Inc.* A Los Angeles radio station with a large teenage audience conducted a contest that rewarded the first driver to locate a disc jockey, “The Real Don Steele,” as he moved from one location to another in his red car. In typical radio style, the contest was promoted directly over the air, with audience members specifically urged to be the first to catch up with the DJ. Two teenage drivers, jockeying for position, raced to the next location at speeds of up to 80 miles per hour. In the process, they forced another car off the road, killing its driver. The driver’s widow sued the radio station, as well as the young drivers, for the wrongful death.

In 1975 the California Supreme Court upheld a jury finding that the rock station was indeed liable for the accident. The language of the court’s opinion was broad and highly critical of the station’s manner of expression. The court declined to apply a heightened First Amendment standard but, even if it had, it might have

reached the same conclusion. In *Weirum*, the court noted, there was a specific attempt to generate a competitive scramble on the public streets, “accelerated by repeated importuning by radio” to be the first one to arrive at a destination.<sup>24</sup>

In a later case involving instructions for action, however, the Supreme Court of Georgia ruled in favor of the media. *Walt Disney Productions, Inc. v. Shannon* arose from an episode of the *Mickey Mouse Club*, a television show aimed at children. A special feature on the show was “all about the magic you can create with sound effects.” One demonstration showed how to produce the sound of a wheel coming off a car by putting a BB pellet inside a round balloon, filling the balloon with air, and then rotating the BB inside. An eleven-year-old boy tried to repeat what he had seen on TV, using a piece of lead twice the size of a BB, and a “large, skinny balloon.” The balloon burst, shooting the lead into the boy’s eye and partially blinding him. He sued the producer, the syndicator, and the local broadcaster of the TV show.

The Georgia court upheld summary judgment in favor of the defendants after determining that the show was protected under the First Amendment by virtue of the clear-and-present-danger doctrine. Wrote the court: “Although it can be said that what the defendants allegedly invited the child to do in this case posed a foreseeable risk of injury, it cannot be said that it posed a clear and present danger of injury.”<sup>25</sup> As evidence of this, the court noted that, of an estimated sixteen million children watching the program, this was the only reported injury relating to the techniques shown.

### **Recordings**

A lawsuit in the late 1980s involved a nineteen-year-old who killed himself in his bedroom while listening to the recorded rock music of Ozzy Osbourne. The victim, who reportedly had emotional and alcohol abuse problems, had listened to certain Osbourne recordings repeatedly on the night of the suicide. The victim’s parents sued Osbourne and others connected with the recordings, claiming that the lyrics conveyed the message that “suicide is not only acceptable, but desirable”<sup>26</sup> as a way to avoid despair and alleging that Osbourne should have known his music would influence emotionally unstable listeners.

In its 1988 ruling, however, the California Court of Appeals applied the *Brandenburg* test and concluded that Osbourne’s music was neither directed toward bringing about imminent suicide nor likely to produce such a result. Therefore, the legal claim was barred by the First Amendment. This court also concluded that, even under the traditional tort law of negligence, the plaintiffs would not win. Suicide was not a reasonably foreseeable consequence of the music, the court said.

In a similar case heard before a federal court in Georgia,<sup>27</sup> two parents sued Ozzy Osbourne and CBS Records, claiming that lyrics in the song “Suicide Solution” incited the plaintiffs’ son to kill himself by firing a pistol at his head.



### Personal Injury Liability

- Was a reasonably foreseeable risk of injury created by the communication?
- Did injury in fact occur?
- Was the careless communication a proximate cause of the injury?
- In addition—a test applied in most, but not all, cases—did the communication actually incite the harmful conduct?

Unlike the California case, though, these plaintiffs charged that the suicide directive was contained in subliminal lyrics aimed at the subconscious mind. The message, they alleged, is intelligible to the conscious mind only when the music is electronically adjusted.

The federal court said that if the Osbourne recording contained surreptitious, subliminal messages it would be relegated to a class of speech worthy of little, if any, First Amendment protection. In this instance, however, the court held that plaintiffs' expert witnesses had failed to produce any credible evidence that subliminal messages actually existed in the recording. Therefore, the recording was fully protected by the First Amendment, and, the court held, the parents could not possibly demonstrate that the lyrics incited imminent suicide. Accordingly, summary judgment was granted in favor of the defendants.

### Books

With its tremendous volume of detailed how-to titles, book publishing is another area in which the courts have been careful not to open the floodgates to litigation concerning authors' particular choices of words. In one recent case a woman died, allegedly of sudden complications caused by a liquid protein diet she was following, as described in a book titled *When Everything Else Fails . . . The Last Chance Diet*. (The woman had lost more than one hundred pounds in about six months but then died of heart failure.) The administrator of the woman's estate sued the publisher and several other parties connected with the book, claiming it was published negligently.

A Pennsylvania appellate court upheld summary judgment in favor of the defendants. Here again, the incitement standard was applied, and the court disagreed that the diet book was "an incitement to immediate unreflecting action such as the action arising from shouting 'Fire!' in a crowded theater."<sup>28</sup>

In a 1991 case, the U.S. Court of Appeals faced a similar claim. But the federal court did not directly discuss the incitement standard; it said that even under basic negligence law a publisher was not liable for harm to readers. The case arose when two mushroom enthusiasts, relying on information in *The Encyclopedia of Mushrooms*, became severely ill from picking and eating wild mushrooms.

Descriptions in the book led the readers to believe the mushrooms they harvested were safe. But in fact, the plaintiffs had eaten one of the most deadly species of mushrooms; both plaintiffs required liver transplants as a result.

The readers sued the book publisher for negligence, alleging that the descriptions in the book were erroneous and led to their illnesses. But the District Court granted summary judgment for the publisher, ruling that publishers do not have a legal duty to assure the accuracy of the books they publish. The Court of Appeals agreed:

We conclude that the defendant has no duty to investigate the accuracy of the contents of the books it publishes. A publisher may of course assume such a burden, but there is nothing inherent in the role of publisher or the surrounding legal doctrines to suggest that such a duty should be imposed on publishers. . . .

Were we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs.<sup>29</sup>

What if the advice is entirely accurate but pertains to an illegal and intentionally harmful activity? Should communication of this kind be given the First Amendment shield of the *Brandenburg* incitement test? Or should this kind of speech be deemed undeserving of any First Amendment protection? Should the answer depend on the degree of detail in the advice? These were the issues in what has come to be known as the “*Hit Man* case.” A flight attendant was found dead in her Maryland home, shot through the eyes. Nearby were the bodies of her disabled eight-year-old son and a housekeeper, also brutally killed. Police soon traced the killings to the flight attendant’s ex-husband and a contract killer he had hired, and the two men were convicted of the murders.

An interesting civil lawsuit arose from the slaying because when police searched the contract killer’s home, they found a copy of a book titled *Hit Man: A Technical Manual for Independent Contractors*. Published by Paladin Press of Colorado, it was a self-described “instruction book on murder” and contained step-by-step tips and diagrams on how to sneak into homes, kill with cruel certainty using a variety of weapons, and then avoid the law. It appeared that advice in the book had indeed been followed by the trigger man, so the family of the victims sued Paladin Press for aiding and abetting wrongful death.

Paladin argued that the book was mere entertainment or abstract advocacy that should be protected by the First Amendment under *Brandenburg v. Ohio*. But in 1997, a federal Court of Appeals disagreed, holding that the book’s content was so detailed and coldly calculating that it became an integral part of the crime, undeserving of any First Amendment shield:

Paladin’s astonishing stipulations, coupled with the extraordinary comprehensiveness, detail, and clarity of *Hit Man’s* instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence

from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law.

In at least these circumstances, we are confident that the First Amendment does not erect the absolute bar to the imposition of civil liability.<sup>30</sup>

Absent First Amendment protection, Paladin agreed to pay a multimillion-dollar settlement in 1999, just days before a jury trial in the case was set to begin.

### ***The Internet***

Free speech issues similar to those in the *Hit Man* case are arising with greater frequency on the Internet. Commonly referred to as “hate speech” and “extreme speech,” one fundamental legal question is whether the online communication amounts to a “true threat” that should be regarded as a form of illegal conduct rather than protected expression.

The World Wide Web is home to thousands of sites dedicated to discrimination, violence, violent pornography, weapons, murder, suicide, and hate. Some of these sites actually urge violent acts or provide detailed instructions on how to commit violence, or both. Such sites have come under increasing public scrutiny, especially after the 1999 massacre at Colorado's Columbine High School, in which two students scattered bullets and bombs about the school, killing or wounding nearly forty people before the two students committed suicide. One of the killers reportedly maintained a hate-filled website and accessed other sites that provided instructions on how to make pipe bombs.

A high-profile case involving extreme speech arose in Oregon when Planned Parenthood and several physicians sued a number of anti-abortion activists and groups that contributed information to a website called the “Nuremberg Files.” The site labeled abortion providers “baby butchers” and listed hundreds of abortion doctors and clinic staff members with such details as their home addresses, license plate numbers, and the names of their spouses and children. Doctors who had been killed by anti-abortion activists were listed with lines through their names, and the names of wounded abortion providers were shown in gray type. Though the website did not expressly threaten anyone or urge specific violent acts, the plaintiffs argued that a true threat was implicit. The plaintiffs sought, under a variety of state and federal statutes, damages and an injunction.

In 1999 a federal jury and judge sided with the plaintiffs. The jury awarded more than \$107 million in damages to Planned Parenthood and the physicians, and the judge issued an injunction forbidding the defendant anti-abortion activists from providing any additional information about the plaintiffs or their families to the Nuremberg Files or any similar website. The federal District Court judge held that, in light of the surrounding factual context of violent debate over abortion, the website did amount to a “true threat” to do bodily harm and that the threat was

released into a known atmosphere of violence against abortion providers. Such personal threats are not protected by the First Amendment, the court held.<sup>31</sup>

The defendants appealed, and in 2001 a three-judge panel of the Ninth Circuit Court of Appeals reversed the trial court, holding that the anti-abortion website was protected speech. The full Ninth Circuit then decided to rehear the case, and in a 6–5 decision upheld the trial court’s injunction against the defendants and their website. The case was sent back to the trial court to reexamine the size of the damage award.

In the full Ninth Circuit opinion, the court said the applicable test was this: Would a reasonable person foresee that the statement would be interpreted by those to whom it was communicated as a serious expression of intent to harm or assault? The court majority said the answer in this case was yes. The Nuremberg Files content was not just a political statement but rather amounted to death threats. “While advocating violence is protected, threatening a person with violence is not,” the court said. “Violence is not a protected value. Nor is a true threat of violence with intent to intimidate.”<sup>32</sup>

### ***User-Generated Content***

A major, developing battleground in communications law is that of liability for user-generated content on Internet sites. We will see in later chapters that user-generated postings has been a major concern of Congress and the courts in the areas of defamation, privacy, and copyright infringement. But user content is raising concerns in the realm of physical safety as well. Fortunately for Internet sites, a federal immunity against civil liability may apply in many cases.

In *Doe v. MySpace, Inc.*, “Julie Doe,” a thirteen-year-old girl, misrepresented her age when she created a profile on MySpace.com. By saying she was eighteen, she was allowed to circumvent certain safety features of the site and make her profile public. Several months later a nineteen-year-old man initiated contact with Julie through the site. They arranged to meet in person, and at that meeting the man sexually assaulted Julie. Julie’s mother sued MySpace and its parent company, News Corporation, on her daughter’s behalf, asserting that MySpace was grossly negligent in failing to implement adequate safety measures.

The federal district court in Texas dismissed the case, finding that the claim was barred by Texas common law and by an immunity provision in the Communications Decency Act.<sup>33</sup> The immunity provision states that providers of interactive computer services shall not be treated as the publisher legally responsible for content posted by another outside party. The Fifth Circuit Court of Appeals affirmed in 2008. The plaintiff’s legal recourse is against the user who generated the content that led to the meeting and who committed the assault, but not against the computer service that merely enabled the online communication, the court said.<sup>34</sup>



### ***The Hypothetical***

So, what about the *Rattlesnake Militia* video in the Hypothetical? Could the website and you, its editor, be held liable for the boy's wrongful death? Presuming the court were to employ the modern version of the clear-and-present-danger standard to safeguard the website's First Amendment rights, liability would not be imposed. The boys were neither encouraged nor incited to immediately imitate the depraved actions shown in the video. Being an Internet service provider, another possibility is that you are accorded statutory immunity under the Communications Decency Act. But that immunity is intended for passive sites, not for those that make case-by-case decisions on all submitted material. (More on that in the next chapter.)

Consider a different hypothetical: What if your website were iHowTo.com and you collected and posted very specific instructional videos on all kinds of challenges and dilemmas, from safe sex to first aid for snakebites. Suppose such a video, through carelessness, contained a *should* where it was supposed to read *should not*, thereby causing harm to the viewer? Should the website be held liable? How about the video's script writer? Should he be insulated from a tort case to any extent greater than if the advice had been given in person? Should it matter how the materials are distributed, such as on a subscription website?<sup>35</sup> The answers are not certain, and further case law is needed to clearly draw the line between protected speech and negligent, culpable instructions.

## **HARM THROUGH ADVERTISING**

Sometimes personal injury lawsuits are prompted by advertising content. Should the standard for liability be any different in such cases? Is advertising any less deserving of First Amendment protection than other kinds of speech? In lawsuits against the medium, as opposed to the advertiser, would it be fair to hold the medium accountable for the content of ads written by others?

### ***Soldier of Fortune I***

The 1989 case of *Eimann v. Soldier of Fortune Magazine, Inc.* raised these issues. The magazine, which focused on mercenary activities and military affairs, ran a classified ad that read as follows:

EX-MARINES: 67–69 'Nam Vets, Ex-DI, weapons specialist—jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas. [phone number]

A man named Hearn later testified that he placed the ad to recruit veterans for work as bodyguards and that “Ex-DI” meant ex-drill instructor, “M.E.” meant multi-engine planes, and “high risk assignments” referred to security work. However, Hearn also stated that about 90 percent of those responding to the ad sought his help in illegal activities such as beatings, kidnappings, bombings, and murders. And that was the problem.

One caller proposed to pay Hearn \$10,000 if he would kill the caller's wife. Hearn said he would consider it, and a few weeks later he did commit the slaying. Hearn was convicted and received a life sentence. But the incident also spawned a civil lawsuit against *Soldier of Fortune* by the son and the mother of the victim. Their claim: the magazine negligently published the ad.

The plaintiffs presented evidence that as many as nine other classified ads in *Soldier of Fortune* had previously been tied to crimes or criminal plots around the country. This suggested that the magazine had reason to know that such ads, including those with ambiguous code words and abbreviations such as Hearn's, posed a threat to public safety. The jury agreed, and it awarded the plaintiffs \$9 million in damages, based purely on a negligence standard.

A federal Court of Appeals reversed the judgment, however. Without deciding whether it was proper for the trial court to apply general negligence principles rather than a more protective First Amendment standard, the court ruled that even under negligence rules the magazine could not be held liable. By publishing this particular ad, the magazine did not fail to exercise reasonable care, the court held:

*Soldier of Fortune* owed no duty to refrain from publishing a facially innocuous classified advertisement when the ad's context—at most—made its message ambiguous. [The ad's] bare terms reveal no identifiable offer to commit crimes, just as a locksmith's ad in the telephone directory reveals nothing about that particular advertiser's willingness to commit burglaries or steal cars. . . . Without a more specific indication of illegal intent than Hearn's ad or its context provided, we conclude that *Soldier of Fortune* did not violate the required standard of conduct by publishing an ad that later played a role in criminal activity.<sup>36</sup>

### ***Soldier of Fortune II***

Soon *Soldier of Fortune* found itself in court again. And in 1993, a different federal Court of Appeals reached a different conclusion. This time the magazine was held accountable for publishing a classified ad that read as follows:

GUN FOR HIRE: 37-year-old professional mercenary desires jobs. Vietnam veteran. Discreet and very private. Bodyguard, courier and other special skills. All jobs considered. [phone and P.O. box]

The sons of a slain businessman sued the magazine for negligence, claiming that their father's associate used the ad to arrange their father's brutal assassination and that the magazine should have foreseen this consequence. Again the magazine's defense was that it had no legal duty to investigate every advertiser and that the ad contained no identifiable risk that it was an offer to commit crimes. In this case, however, *Braun v. Soldier of Fortune Magazine, Inc.*,<sup>37</sup> the court upheld a nearly \$4.5 million jury verdict against the magazine.

The Court of Appeals upheld the judgment for the following reasons:

1. Unlike *Eimann*, the trial judge in *Braun* instructed the jury that it could hold the magazine liable only if the ad on its face contained a *clearly identifiable*, unreasonable risk of harm to the public; this was the proper negligence standard.
2. The sinister language in the ad made it apparent there was a substantial danger of harm to the public; the magazine should have recognized this as a solicitation for illegal jobs involving a gun, “as readily as its readers obviously did.”
3. Because the First Amendment does not protect commercial speech related to criminal activity, there was clearly no need to employ a heightened constitutional standard for liability (such as “incitement”).
4. By instructing the jury that the magazine could be liable only if the ad on its *face* would have alerted a reasonable publisher to the danger, the magazine would not suffer an impermissible “chilling effect” on speech. The court referred to this as a “modified” negligence standard that provided all the First Amendment protection necessary.

As a general rule publishers and broadcasters are not considered liable for harm caused to individuals by advertised products and services (though the advertiser is within the chain of potential liability). This is because the media usually would have no reason to suspect that a particular product is defective. Only when the medium actually should have known of the danger can it be held accountable, and there is no legal duty to investigate all products and ad claims in advance. Courts have often noted that a rule to the contrary would open the doors to lawsuits that could not reasonably be anticipated and that such an economic burden on the media would adversely affect editorial content.<sup>38</sup>

When it should be clear from the face of an ad itself that it presents a public safety risk, the media that run the ad anyway may indeed be deemed negligent and potentially within the chain of liability. The *Soldier of Fortune* cases demonstrate that in such instances not all courts feel obliged to provide special First Amendment protection by requiring plaintiffs to meet the tougher incitement test.

Undoubtedly the courts will continue to see many variations and twists on this basic personal injury theme in the years ahead. For example, one case concerned *Boy's Life* magazine and its publication of a special advertising supplement titled “The Shooting Sports: Aiming for Fun.” Immediately after reading the supplement, a twelve-year-old boy and several of his friends located a .22-caliber cartridge and an old rifle that belonged to one of their fathers. The rifle accidentally discharged, and the boy was killed. His mother sued the Boy Scouts, which publishes the magazine; Remington Arms Company, which advertised in the supplement; and the Shooting Sports Foundation, which sponsored the supplement. She alleged that her son was motivated to experiment with the rifle

and cartridge as a direct result of negligent publication of the supplement in a magazine for young, impressionable readers.

In 1993 a Texas appellate court upheld summary judgment in favor of the defendants. The court held that the boy's "experimentation" with the rifle was not a reasonably foreseeable consequence of the publication. It noted that photos and features in the supplement emphasized adult supervision and the use of firearms in a structured, safety-conscious environment. Because the accident was not a foreseeable result, the defendants did not have a legal duty under negligence law to avoid such publications. The court barely mentioned the First Amendment, but it did note that truthful commercial advertising had been accorded some degree of constitutional protection by the U.S. Supreme Court.<sup>39</sup>

The standards for personal injury cases against the media are not entirely settled. As we have seen, courts usually excuse the media from liability, either under basic negligence law principles or by applying a First Amendment buffer such as the *Brandenburg* incitement test. Media liability appears most likely in cases involving commercial advertising or promotions for hazardous and illegal products or services, where the danger is foreseeable to the media.

## Summary Points

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**The initial First Amendment cases** considered by the Supreme Court dealt with speech that was aimed at arousing others to commit harmful acts. The Court used the standard of clear and present danger to determine when the speech posed a serious enough threat to be punishable by government.

**Over time, the constitutional standard for the government** became tougher and thus the realm of protected speech greater. To be punishable, the Court looked for incitement to imminent harmful conduct that was likely to occur.

**In cases in which information dissemination might threaten national security**, the courts have not employed the incitement standard. But neither has another specific test emerged. In the Supreme Court's only national security case, that of the Pentagon Papers, the message was generally that the government would need to convince the Court of grave danger before a prior restraint could be valid.

**The last twenty years have seen an increase in tort cases** against the media for personal harm relating to content. Though the U.S. Supreme Court has yet to enter this area, lower courts have often, though not always, employed the incitement test rather than allow liability on negligence alone.

**The Hypothetical at the beginning of this chapter** presented three separate problems: a government demand against further posting of the terrorist video

containing secret information, a criminal prosecution for posting video that some might see as “glorifying” terrorists, and a civil lawsuit by distraught parents. The principles discussed in this chapter suggest that you should be safe from all three legal assaults. The take-down demand is a prior restraint and, following the lead of the Pentagon Papers case, it would need to be supported by a clear and overriding security threat that does not seem apparent from the facts in the Hypothetical. The criminal statute noted in the Hypothetical is actually similar to language in the United Kingdom’s Terrorism Act 2006. But that language doesn’t match up well with the *Brandenburg* incitement test for allowable prosecution speech that could spur lawless, dangerous conduct. Finally, the wrongful-death lawsuit would fail because of the plaintiff’s inability to show that the video incited or instructed the boys’ criminal actions.

## Discussion Questions

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1. Is it likely that the incitement test as stated in *Brandenburg v. Ohio* could ever be met by a mass media communication, as opposed to an in-person, live expression? Or should the courts adopt a solid rule that impersonal expression through the mass media can never be deemed directly to incite hazardous behavior? Suppose, in the chapter Hypothetical, that the editorial urging violence at the military base had aired live on TV and had urged citizens to act “now”? Could that broadcast qualify as incitement?
2. The courts have on many occasions found manufacturers liable to consumers who were injured after relying on erroneous or misleading product instructions. Lawsuits based on faulty instructions are called product liability lawsuits. How are such cases distinguishable from the lawsuit against the publisher of *The Encyclopedia of Mushrooms*? Should the authors of product instructions have less constitutional or common law protection than the authors and publishers of books, where the “product” is the expression itself?
3. A few of the cases described in this chapter (the *Hit Man* and Nuremberg Files) concerning highly detailed or personal information about how or whom to harm raise serious questions about the applicability of the *Brandenburg* test or any other First Amendment inquiry. Are there times when media content should amount to a criminal or civil violation of law without regard to the First Amendment?
4. The terrorist attacks of September 11, 2001, in which hijacked commercial jets were used as weapons, began a new era of security concerns in the United States. Suppose that in a certain city officials have reason to believe the terrorist threat is particularly high, and they have warned citizens to be on the alert for any suspicious behavior. In this context, further suppose that

a local newspaper or a website is running a detailed story about likely targets and has decided to provide very specific diagrams and information about a large dam just outside the city, including identification of its most vulnerable structural points. What is the likelihood that the state could obtain a restraining order to prevent that information from being made public?

## Key Terms

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clear and present danger  
due care  
Espionage Act  
incitement standard

negligence  
reasonable care  
Sedition Act  
Smith Act

# Damage to Reputation



*After completing this chapter, you should*

- **Appreciate** the justifications behind laws that aim to protect people's reputations.
- **Know** the elements that libel or slander plaintiffs must prove to win a lawsuit against mass communicators.
- **Know** the defenses and procedural rules that may protect mass communicators from libel and slander claims.
- **Be** able to analyze a factual situation to determine whether a risk of libel or slander liability is present.
- **Understand** why much sentiment exists for major reforms in this area of the law.

## EVOLUTION OF DEFAMATION LAW

For many centuries, in cultures around the globe, humanity has recognized the importance of an individual's reputation. Reputation is what a person is seen to be in the eyes of others—the individual's projection of self within a society.

## Hypothetical

### The Disparaged Sheriff

You are the local advertising manager for a small daily newspaper. One afternoon during the political campaign season, you are visited by three members of a citizens' group called People Opposed to Scandal and Soft Enforcement (POSSE). The group, composed of business leaders, educators, political activists, and others concerned about crime, is opposing the reelection of local sheriff Angelo "Jake" DiPunto. The POSSE leaders ask you to run a half-page display ad that reads as follows:

Enough already! Our community is one of history, pride, and decent people. But crime is taking that away from us. Violence, theft, drugs—crime has become an insidious cancer in our neighborhoods, and it's time to fight back!

You can begin on election day by saying NO to another term for one of America's most vile and backward sheriffs, Jake DiPunto. At a time when we need leadership in law enforcement, we instead have a lazy, pathetic slob for a sheriff. He's had eight years to prove himself, but all he has proved is that he's more like a spineless politician than a leader for justice. How long will he keep looking the other way? The evidence makes us wonder, is he taking bribes? Join with the citizens of POSSE in voting out this sleazy man who himself may soon be indicted for crimes.

POSSE is an aggressive and outspoken organization, but a reputable one, and you would run the political ad with a disclaimer reading "Political ad paid for by People Opposed to Scandal and Soft Enforcement." On the other hand, your own newspaper's reporters say they don't think the sheriff has ever been investigated for criminal activity, and you don't think the sheriff is a slob.

Under these circumstances, would publication of the ad present legal dangers for you? If so, what specific changes would you require before accepting the ad?

The group also offers to pay your usual rate to place on your paper's website a link to the POSSE site. The POSSE website is devoted primarily to ousting the sheriff, and it contains language very similar to the proposed ad, enhanced with several unflattering photos of the man. The POSSE people say they will be updating their site weekly, adding some new and more detailed information. Would you provide the link?

Resting upon this projection are personal dignity, honor, and oftentimes extensive tangible benefits such as patronage in the marketplace. A good reputation may be the fruit of prolonged dedication and hard work, whether in a trade or in the building of personal relationships.

Yet, however well it may have been nurtured, a reputation can be poisoned by rumors or, in modern times, shattered literally overnight by accusations in the



mass media. This is why most countries have long had laws against what is now called **defamation**—an attack upon the reputation of another person.

Historically, many of these laws were harsh indeed. U.S. defamation law can be traced to England's infamous Court of the Star Chamber, established in the late 1400s to take a tough stand on law and order. The Star Chamber, sitting without a jury, punished defamation by ordering money payments to the defamed party and by maiming and imprisoning the guilty. That the defamatory statements might be true was no defense. This harsh system of "justice" was replaced by a practice hardly more civilized—the tradition of dueling to vindicate honor.

Through the centuries the laws protecting reputation have been refined, and in most cultures the penalties are imposed with greater restraint than the Star Chamber exhibited. Yet the underlying sentiment for defamation laws remains strong. Wrote Justice Potter Stewart of the United States Supreme Court: "The rights of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."<sup>1</sup>

Furthermore, the penalties today may still be harsh—financially. In 1990 a lawyer who sued the *Philadelphia Inquirer*, claiming he had been defamed by a series of articles, won a whopping \$34 million in damages from a Pennsylvania jury, the largest libel award ever given by a jury at that time.

In the 1980s some legal scholars began predicting that the emerging laws of privacy or mental distress (discussed in Chapter 5) eventually would eclipse defamation law, but today the relatively ancient laws of defamation still pose a pervasive legal threat to American media. In many cases the threat is not so much the ultimate legal outcome as it is the bad publicity, considerable time and hassle, and significant lawyers' fees that frequently accompany a defamation lawsuit. The costs of defending in court may run into the hundreds of thousands, even millions, of dollars.

Today the media prevail in about 75 percent of all the defamation lawsuits filed against them, prior to trial, by winning motions for summary judgment. Many other cases are settled between the parties out of court, on terms relatively favorable to the media. Around the country, only about twenty media defamation cases go to trial each year.

But when the cases do go to trial, the media fare less well. According to the Media Law Resource Center, which conducts annual studies of libel claims against media defendants, the media have won only about 40 percent of their trials since 1980. And the average award to the winning plaintiffs at trial has been nearly \$3 million. The *ultimate* disposition of these cases, after post-trial motions and appeals, is more favorable to the media, however. The media have ultimately

won about 55 percent of the cases that went to court, and the average award to winning plaintiffs at the end of the day has been \$560,000.

## DEVELOPMENT BY THE STATES

From the beginning of this nation, defamation law fell almost exclusively under the domain of the various states, not the federal government. And in most respects, the states adopted their rules from the English common law. For more than 150 years the various states compiled, unfettered, an enormous body of law pertaining to civil and criminal defamation. Primarily through court decisions and occasionally through legislation, defamation law evolved into a complicated web of rules involving careful distinctions and a legal terminology all its own. Some of the time-honored rules were of questionable value by the mid-twentieth century, however. Wrote law professor William Prosser in his authoritative treatise on torts: “It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense.”<sup>2</sup>

### *Libel or Slander?*

By the mid-seventeenth century in England, two separate branches of defamation law had evolved: **libel**, which was written defamation, and **slander**, which was spoken defamation. The various states carried the distinction forward in this country. Because people seemed all too eager to run to the courts and sue one another for spoken insults, and given that the spoken words were fleeting in nature, the courts set stricter rules of proof for people complaining of slander. Also, only specified kinds of defamatory remarks could be grounds for a lawsuit.

In contrast, written defamation tended to be longer lasting and more broadly distributed (and was therefore considered more harmful); it involved more premeditation on the defendant’s part and it was of course easier to prove. Therefore, in libel cases the balance of fairness was seen to weigh more heavily on the plaintiff’s side. Thus libel lawsuits were permitted in a broader range of accusations, and injury to the plaintiff often was presumed, without proof.

Eventually, however, the rules of libel and slander began to converge. In the United States today, the libel/slander distinction has all but disappeared. The only significant remnant found in some states is a requirement that slander plaintiffs prove some financial injury in order to recover any damages—a burden usually not required of plaintiffs in libel cases.

Further blurring the distinction today is that defamation in the electronic media is not easy to categorize as either libel or slander. Statements made on a radio program are more fleeting than those in print—a characteristic of slander. But they are capable of very broad dissemination and usually involve premeditation—characteristics of libel. In most states today, the rule is that

defamation by way of any mass medium is considered libel, though some states, including California, do classify broadcast defamation as slander. This book will use the term *libel* to refer generally to libel and slander.

### ***Crime or Tort?***

In the eighteenth and nineteenth centuries most defamation law, in the colonies and then the states, was criminal. The government prosecuted instances of defamation, and punishment could be particularly harsh for seditious libel—disparaging remarks about government officials—as noted in Chapter 2. Over time, however, most of the action shifted to the civil arena where, treating libel and slander as torts, individuals could sue to collect money for the harm suffered.

By the mid-1900s, defamation had evolved almost entirely into a matter of civil law. Criminal libel statutes do remain on the books in almost half the states, and they are used occasionally to prosecute nonmedia defendants, typically for malicious Internet postings and personal vendettas involving hatefully concocted stories. A rare mass-media case occurred in 2002, when a Kansas jury convicted the editor and the publisher of a local tabloid, *The New Observer*, on misdemeanor (that is, criminal) libel charges. The paper had maliciously asserted, the jury concluded, that the mayor of Kansas City did not live in the city and was violating the residency requirement for her office by residing instead in an affluent neighboring county. Because such criminal cases against the media have been extremely rare for half a century, this chapter focuses on the civil side of defamation law.

## **THE CONSTITUTION INTERVENES**

Amazingly, it was not until 1964 that a direct confrontation with the First Amendment altered the course of common law defamation. A U.S. Supreme Court case called *New York Times v. Sullivan* began an era of defamation law, marked by the injection of constitutional free expression safeguards, that continues today. It is an era of careful balancing between reputation rights and First Amendment principles of free expression—an era of increasing constitutionalization of defamation law.

During the colonial era, juries, interestingly, came to the rescue of the media and began to insulate them from authoritarian courts. In the celebrated 1735 trial of printer John Peter Zenger, for example, a New York jury refused to convict for seditious libel, despite the letter of the law. Today, however, it is often the courts, injecting constitutional safeguards, that give the media some protection from juries.

Application of the First Amendment also furthered the decline of criminal prosecutions for defamation. The U.S. Supreme Court has never ruled that criminal defamation statutes are, per se, unconstitutional. But, just eight months

after it entered the defamation field with *New York Times v. Sullivan*, the Court reversed a criminal defamation conviction and significantly limited the reach of criminal defamation statutes.<sup>3</sup> Today criminal defamation prosecutions are constitutionally suspect.

## INGREDIENTS FOR A LAWSUIT

Not all disparaging remarks about a person amount to a tort of libel. For our purposes, libel may be more fully defined as a false allegation of fact that is disseminated about a person and that tends to injure that person's reputation.<sup>4</sup> This working definition adds insights to the tort, but it is just a beginning. To truly understand the likelihood and validity of libel claims, it is important to view libel as a tort composed of six main elements. A libel plaintiff usually must prove all six elements in order to win a case against a mass medium or individual communicator. (It is said that the plaintiff has the "burden of proof" in these elements.) The elements are

1. Defamatory content
2. Falsity
3. Publication
4. Identification
5. Fault
6. Harm

It's advisable that you memorize these elements and understand each in some detail.

## DEFAMATORY CONTENT

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To win a lawsuit, a libel plaintiff must pinpoint the specific defamatory content that is the source of complaint. Regardless of the form of the communication, this content often is referred to as the defamatory statement.

## THE MEANING OF *DEFAMATORY*

Defamatory content is that which would tend to damage the plaintiff's standing among some respectable segment of society. Typically it is statements that call into question an individual's honesty, professional competence, sanity, solvency, morality, or social fitness. The *Second Restatement of the Law of Torts*, a definitive treatise that serves as a model for the states, says: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."<sup>5</sup>

### **Threat to Reputation**


Note that a statement is not considered defamatory simply because the affected person himself doesn't agree with it, doesn't like it, is annoyed or embarrassed by it, finds it unflattering, or believes that it is less than accurate. Statements that amount to mere insults or name-calling are not grounds for a libel claim. In contrast, a defamatory statement carries with it an element of ridicule or disgrace; it must tend to injure reputation. When analyzing a potential libel situation, the first thing communicators should do is determine whether there is indeed some defamatory content.

In most cases a defamatory statement is recognizable as defamatory “on its face.” This means that no additional information is needed in order to convey the harmful, defamatory meaning. Such language is also referred to as libel *per se*. The usual categories of such defamation are messages imputing that a person: (1) has committed a crime, (2) is infected with a loathsome, contagious disease, (3) is incompetent in his or her profession, or (4) has engaged in sexual or social misconduct. Examples: accusations that a banker “has ties to organized crime,” that a physician “is an alcoholic,” that a public official “takes bribes” (as in the chapter Hypothetical), that a college student “has AIDS,” or that a married person is “out having affairs.” (More examples of troublesome words appear in Exhibit 4.1.)

Such factors as geographical location, historical period, and the nature of the audience may have some bearing on whether words are considered defamatory on their face. For example, a charge that a minister has “lost his faith” might cause his congregation to dismiss him, whereas he might suffer little or no reputational damage in society at large. Similarly, falsely implying that someone is a homosexual has traditionally been viewed by the courts as a defamatory statement. But in states that recognize same-sex marriage or in communities with large gay populations, whether an imputation of homosexuality is defamatory may be a highly disputed legal question.

Sometimes a defamatory statement is present even though the defamatory meaning is not apparent on its face. The defamatory meaning comes into focus only when considered in light of additional facts. Such language is sometimes called libel *per quod*. For example, a false and unauthorized newspaper report that a college student has given birth to twins would not, on its face, be considered defamatory. The student might be bothered and inconvenienced by the report, but reputational harm would not be a natural result. Acquaintances would tend to send congratulation cards. However, the report would become defamatory if readers know that the plaintiff's husband is in the Navy, that he has been stationed overseas for the past thirteen months, and that she has not seen him during that time.

Though libel claims are usually based on verbal accusations, this is not a requirement. The notion of a defamatory statement must be considered more broadly. Photographs and cartoons (either alone or in combination with captions or narration) and gestures (of a TV news anchor, for example) also could qualify as defamatory statements. Particularly in this era of computer-generated images, defamation through modified pictures is a danger. Such would be the case if two



Text not available due to copyright restrictions

photographs, one of a local banker and one of an organized crime figure, were blended to make it look as though the two people were conversing on a secluded park bench.

### ***Living Persons and Businesses***

Any living individual can be defamed and can sue for libel. However, lawsuits cannot be maintained on behalf of people who were deceased at the time of publication. The rationale for this, of course, is that a dead person probably will not suffer from a tarnished reputation in society. Libel is considered a personal tort, and it is often said that the ability to sue dies along with the potential plaintiff.

Communicators must be careful, however, because derogatory comments about deceased people sometimes may also defame the living. An example of this might be an erroneous report that a fraternity member's deceased roommate had AIDS. The living fraternity member might sue on his own behalf.

In addition to individuals, many kinds of formal business, charitable, and labor entities can be defamed and have been allowed to sue for libel in their own names. These include profit-making and nonprofit corporations, partnerships, and labor unions. Therefore, statements that a corporation's pricing policies are fraudulent could injure the corporate reputation and could lead to a libel lawsuit by the corporation. These entities, as such, are not defamed by statements about individual employees or officers, however, unless the accusations also cast aspersions upon the entity's conduct.

Are business entities or individuals within them defamed by negative statements about the company's products? As a general rule, no. To defame the manufacturer, comments about the product would have to be so negative as to imply deceit by company officials, for example. Saying that a product is poorly made or unequal to the competition is not enough to defame the manufacturer. However, a specialized tort called **trade libel or product disparagement** may apply in these circumstances. This tort allows companies to recover for false statements about the nature of their products. Although the elements of this tort are the same as those for personal libel in most respects, trade libel is a less attractive claim for plaintiffs because damage awards are usually limited strictly to direct monetary loss.<sup>6</sup>

In the 1990s more than a dozen states passed special product disparagement statutes giving farmers and food companies a right to sue when their food products are publicly and falsely criticized. The impetus for the laws was a CBS News *60 Minutes* segment in 1989 that linked cancer with the chemical Alar, which some apple farmers sprayed on their trees. The demand for apples plummeted following the broadcast, and some apple growers went bankrupt.<sup>7</sup> The new "veggie libel" laws, as they are sometimes called, give the producers of disparaged food products a right to sue even if no particular producer or food company is criticized. Television talk show host Oprah Winfrey was sued (unsuccessfully) by Texas cattle ranchers under such a statute following a 1996 broadcast suggesting that it was dangerous to eat U.S. beef because of mad cow disease.

Unlike corporations, government entities are not permitted to sue for libel. Individual government officials, however, are capable of being defamed and often do sue for libel.

## INTERPRETING THE STATEMENTS

Often the meaning of language is unclear and a statement may be susceptible of two or more interpretations, only one of which is defamatory. In such cases a jury ultimately determines the precise sense in which a statement was likely to be understood. When interpreting potentially defamatory statements, the courts will look to overall context and the natural effect of language as guidelines.

### **Overall Context**

First, statements should be considered in light of their overall context. This means that courts will not simply scrutinize the literal meaning of words in isolation or out of context. Rather, the language will be examined in light of the entire article or story, sometimes even in light of the overall nature of a publication or broadcast program. For example, a Texas sheriff sued for libel over a book passage about a shooting that described him as “the police executioner.”<sup>8</sup> But this was held not to be defamatory because the overall context clearly described the shooting as an act of justifiable self-defense.

Whereas overall context can help erase a defamatory impression in some cases, context in other instances can have the opposite effect of inflaming what otherwise might be a passage of insignificant defamatory effect. This may be especially true in television and other dramatic, high-tech media. As one federal court explained:

Television broadcasts add new and potentially significant variables to the defamation analysis. Courts must scrutinize the juxtaposition of the audio and video portions of a television program. In subtle ways, a television director can alter the tone of an otherwise innocuous broadcast. With the emerging popularity of self-styled “magazine” news programs, courts should be sensitive to the possibility that a transcript which appears relatively mild on its face may actually be, when the total mix of creative ingredients are considered, highly toxic. Indeed, a clever amalgamation of half-truths and opinion-like statements, adorned with orchestrated images and dramatic video accompaniment, can be devastating when packaged in the powerful television medium.<sup>9</sup>

### **Special Problem: Headlines**

Though context is typically considered when determining defamatory content, courts have been inconsistent in their approach to headlines. Bold and sketchy by their very nature, headlines are frequently the source of anger for the subjects of articles and thus the impetus for lawsuits as well. Some courts have employed the general rule of considering the overall article to determine whether the headline was a defamatory communication.<sup>10</sup> Others have scrutinized a headline as it stands alone, on the rationale that newspaper readers often have only the time or interest to read the headline and not the story.<sup>11</sup> So, although overall context usually is considered when determining the existence of defamation, you should presume that headlines and titles alone may be deemed defamatory, even if the body of the accompanying article is accurate and inoffensive. A federal appeals case makes this clear.

One week after the famous O. J. Simpson murder trial ended in his acquittal in 1995, the front page of the *National Examiner* proclaimed in a headline



“Cops Think Kato Did It!” The headline referred to Brian “Kato” Kaelin, who became publicly known during the trial as the long-term guest at Simpson’s estate. Actually, police did not think Kaelin committed the murders, and neither did the *Examiner*, apparently. The text of the story made it clear that “it” in the headline referred not to the murders, but rather to lying on another point. Kaelin sued the tabloid for libel, seeking \$15 million. The *Examiner* sought summary judgment, claiming that the full published story protected the paper.

In an important decision, however, the U.S. Ninth Circuit Court of Appeals ruled that headlines alone can be libelous. The court said a reader could reasonably interpret the *Examiner*’s headline to mean that police suspect Kaelin committed the slayings of Nicole Brown Simpson and Ronald Goldman. It was for a jury to decide whether the headline alone was indeed libelous and malicious, the court said.<sup>12</sup> In 1999 the parties agreed to a settlement.

### **Natural Effect**

As a second and related guideline to context, statements should be analyzed for their natural effect on the average reader or listener. Potential libel plaintiffs often attach hypersensitive, even neurotic, meanings to statements about them in the mass media. It is not the plausible meaning advanced by the plaintiff that determines whether a defamatory statement has been made, however. Rather, it is the statement’s natural and probable effect upon the mind of the average reader or listener. During prepublication review, communicators should ask “How would most people understand this?”

For example, language that an average person would understand purely as a joke, satire, or **rhetorical hyperbole** (emotional, exaggerated name-calling) is regarded as nondefamatory. This is because the listener or reader knows the statements don’t amount to anything, that they are not to be taken literally. Therefore statements that a police officer was a “clown and a big, fat ape,”<sup>13</sup> and references to a TV talk show guest as a “fat bitch” and a “pair of tits with legs”<sup>14</sup> were held nondefamatory. Jokes, put-downs, and unflattering nicknames may generate amusement within an audience, but such expression typically does not damage the subject’s reputation.

However, if statements of ridicule also imply sincere and specific allegations, the communicator cannot escape liability by claiming they were intended in jest. It is the natural understanding of the proverbial reasonable person that is controlling.

### **Defaming by Implication**

The principle of natural effect is also illustrated by a developing area of the law referred to as **libel by implication**. This occurs when the individual statements communicated are literally true or nondefamatory, but taken together they leave the ordinary audience member with a false and defamatory conclusion.

In *Newton v. National Broadcasting Co.*, a federal court concluded that just such an implication arose from an *NBC Nightly News* story aired in 1980. The script read in part as follows:

[Guido] Penosi is a New York hoodlum from the Gambino Mafia family, a man with a long criminal record, now believed to be the Gambino family's man on the West Coast, in the narcotics business, and also in show business. Penosi is also a key figure in a federal grand jury investigation . . . that involves one of the big casinos here [Las Vegas], the Aladdin; and one of Las Vegas' top performers, singer Wayne Newton. . . . [L]ast week, Newton and a partner were given state approval to buy the Aladdin Hotel in Las Vegas for \$85 million. A federal grand jury is now investigating the role of Guido Penosi and the mob in Newton's deal for the Aladdin. Despite his big income, authorities say Newton has had financial problems. Investigators say that last year, just before Newton announced he would buy the Aladdin, Newton called Guido Penosi for help with a problem. Investigators say whatever the problem was, it was important enough for Penosi to take it up with leaders of the Gambino family in New York. Police in New York say that this mob boss, Frank Piccolo, told associates that he had taken care of Newton's problem and had become a hidden partner in the Aladdin Hotel deal.<sup>15</sup>

Literally speaking, almost all the individual facts reported by NBC were true. But the problem for which Newton contacted Penosi, as it turned out, was that members of an organized crime syndicate had directed threats at Newton and his daughter. Newton asked Penosi if he could stop the threats. Penosi in turn contacted Piccolo, who arranged with another family, which was threatening Newton, to stop the threats.

The District Court ruled that quite a different implication arose from the story, however:

The clear and inescapable impression made by the broadcast was that the plaintiff did not have enough money to buy the Aladdin Hotel so he called a friend, Guido Penosi, who had ties to organized crime; and that Mr. Penosi helped him raise the money and thus obtained a hidden interest in the Aladdin Hotel.<sup>16</sup>

This impression was defamatory, the court ruled, because arranging for someone to obtain a hidden interest in a casino is a crime. (Newton ultimately lost in the Court of Appeals on other grounds.)

A 2001 decision by the Supreme Court of Texas reinforces the point that a defamatory message may be derived from the overall tone or implication of a story rather than from its individual statements. Sylvester Turner was a lawyer and a candidate for mayor of Houston. Shortly before the election, TV station KTRK aired a story about possible life insurance fraud by a client of Turner and allegations that the client may have faked his own death at sea. At the beginning of the complicated story, the news reporter said, "Among the questions: What role

did Houston mayoral candidate Sylvester Turner play in this tale of multimillion-dollar fraud?” The narration continued with the reporter asking questions about what Turner might have known about his client and suggesting that something was fishy in the timing and sequence of events between Turner and the man for whom he provided estate planning services. Though no statements in the news report directly accused Turner of wrongdoing, the implication was strong enough for the jury to award Turner some \$5 million in damages in his libel lawsuit against the station.

The Texas high court agreed that Turner was defamed by the story as a whole and the impression it left on viewers, even though the individual statements, taken in isolation, may have been literally true or nondefamatory. “By omitting key facts and falsely juxtaposing others, the broadcast’s misleading account cast more suspicion on Turner’s conduct than a substantially true account would have done.”<sup>17</sup> (Turner’s trial victory was reversed on other grounds.)

### ***Thoughts, Not Mere Words***

Many libel experts have compiled lists of words and expressions that have generated lawsuits or that have indeed been held defamatory in some court. The purpose of such lists, such as the list in Exhibit 4.1, is to help communicators see the kinds of language that should raise red flags. It is important to remember, however, that the element of defamatory content actually concerns the particular thoughts delivered to an audience. Words are but one tool for conveying thoughts, and words themselves are subject to differing meanings. To quote Justice Oliver Wendell Holmes: “A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”<sup>18</sup>

Therefore, an exhaustive list of defamatory words and “safe” words would be impossible to compile. And communicators should not screen for defamatory content based solely on a list of red-flag language. Defamatory meaning is determined by the particular circumstances of the communication, including the environment in which the statements were made and who the target of the offending language happens to be. Language deemed nondefamatory in one setting might indeed be defamatory in another. And even where the circumstances are nearly identical, different jurisdictions occasionally may reach different conclusions.

You need to keep sight of the underlying rationale for libel law and recognize important distinctions in differing factual settings. For example, in one case an article/illustration left readers with the impression that a particular trucking company was going out of business. This was held to be defamatory.<sup>19</sup> On the other hand, a premature report that an individual had died was held not to be defamatory per se.<sup>20</sup> How might these differing results be explained? Why is an erroneous report of a business’s demise more likely to be defamatory than a false announcement of an individual’s demise?

What about the Hypothetical problem at the beginning of this chapter? Would the disparaged sheriff have any difficulty identifying defamatory content in the newspaper ad? No. Virtually all of the accusations would be understood as sincere allegations and would tend to lower the reputation of a sheriff. Most damning are suggestions that the sheriff is probably taking bribes and may soon be indicted. The terms *spineless*, *vile*, *sleazy*, *lazy*, and *slob* might be deemed mere rhetorical hyperbole in other contexts, but given the grave tenor of this ad, they may be taken as serious allegations here. *Spineless* would not be taken literally, of course, but could reasonably be understood to convey the idea that the sheriff lacks courage and is manipulated by criminals. Similarly, the term *sleazy* in this context might suggest someone with shoddy morals and imply criminal wrongdoing. Many of the accusations would be defamatory, then, suggesting criminal activity and incompetence, and the sheriff would have the first ingredient for a successful libel claim. This does not mean, however, that we can pronounce him the winner of a libel lawsuit.

## FALSITY

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In addition to being defamatory in nature, statements also must be false in order to support a libel lawsuit, with rare exceptions. It has long been the prevailing view in the United States that truth is a complete bar to a libel claim.

In 2009 the First Circuit Court of Appeals provided a rare deviation from this rule. A former Staples employee sued the company after a vice president there sent an email to 1,500 employees advising them that the plaintiff had been fired for violating travel and expense policies. The email was truthful, but the plaintiff nevertheless argued that under the applicable Massachusetts libel statute, adopted in 1902, the claim could proceed if it were shown the communication was made with malicious intent or ill will. The federal appellate court agreed and remanded the case for trial.<sup>21</sup> Though the case sent shock waves through the ranks of free-speech advocates, it remains safe to assume in mass-media cases that libel claims require a *false* defamatory statement.

Often in libel lawsuits, however, the truth or falsity of the derogatory accusations is murky. Evidence is provided on both sides. Therefore, a key question is who has the burden of proof. Must the plaintiff convince, by a majority of the evidence, that the statements are false? Or must the defendant muster the majority of evidence and thus prove truth?

## BURDEN OF PROOF

Technically speaking, the traditional common law rule in America was that truth was a defense to libel. This meant it was the libel defendant's burden to raise the question of truth and to prove it by a majority of the evidence. If this could be

done, in most states truth was a complete defense to libel, even if the offensive statements were born of malicious intent. But in the modern era of constitution-alization, U.S. Supreme Court rulings have shifted the burden in most cases to the plaintiff to prove falsity.

The Court addressed this issue directly in the 1986 case of *Philadelphia Newspapers, Inc. v. Hepps*. Hepps was the primary owner of a corporation that franchised a chain of snack stores. The *Philadelphia Inquirer* published a series of articles suggesting that Hepps and the company were linked to organized crime. Hepps and the corporation sued for libel, but the Pennsylvania courts disagreed over which side had the burden of proof on the question of truth or falsity.

In a 5–4 decision, the U.S. Supreme Court held that libel plaintiffs must shoulder the burden of proving falsity, at least when the speech in question relates to a matter of public concern—as almost all mass media content does. This made falsity one of the libel elements that a plaintiff must prove. This burden can be the deciding factor whenever the factual evidence in a case is ambiguous. Justice Sandra Day O'Connor recognized this and wrote for the majority: “[W] here the scales [of evidence on truth or falsity] are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech.”<sup>22</sup> This is necessary, she wrote, to ensure that true speech on matters of public concern is not deterred simply because the speaker might have difficulty proving truth in court.

In the dissenting opinion, Justice John Paul Stevens called the majority ruling a “blueprint for character assassination” and a “wholly unwarranted protection for malicious gossip.”<sup>23</sup> Stevens thought that the Court’s existing fault standards, discussed later in this chapter, already were enough of a burden on libel plaintiffs and that unscrupulous communicators might now be tempted to tell deliberate lies, knowing that some lies are very difficult to prove false. For the majority, however, the burden of proving falsity was simply a logical extension of the existing requirement that the defendant be proved at fault.

This is an interesting and important philosophical argument, as well as a procedural one. In practice, however, communicators should not feel overly secure in the fact that falsity has been added as a plaintiff’s burden at trial. The fact is that clear, provable truth is the best deterrent to a libel lawsuit and one of the best ways to win one. And should a controversy actually reach the courtroom, communicators will need to answer the plaintiff’s claim of falsity with their own evidence of truth.

## HOW FALSE MUST IT BE?

How false must a communication be in order for the plaintiff to win on this point? It is not necessary that material be precisely accurate in every detail in order to be protected from libel. The question is whether the material is substantially false or

substantially true. A communication remains substantially true if it is accurate as to those assertions that go to the heart of the defamation alleged—even though relatively minor, accompanying facts may turn out to be false.

For example, suppose you write that a particular chemical company illegally dumped toxic wastes into Trout River on April 24. You'd better be correct about the allegations that toxins were dumped into that river, by that chemical company, and that the action was illegal. However, if you were wrong about the date—the chemicals were dumped on April 26, not 24—your story still would be considered substantially true in the eyes of the law. The portions of your account that are truly reputation-threatening are true.

### ***Special Problem: Fact versus Opinion***

Implicit in the constitutional requirement that statements considered libelous must be proven false is the requirement that the statements lend themselves to a truth-or-falsehood determination. In other words, as a logical outgrowth of the requirement that libel claims be based on falsehoods, it is required that the complained-of statements be allegations of fact, not mere judgment or opinion that cannot be proven true or false.

### ***The Fair Comment Privilege***

For decades a **fair comment privilege** has been recognized under common law. The privilege allows the media to make “good faith” critiques of speeches, plays, books, and other matters of general public interest. This important but relatively narrow common law privilege has in most cases been eclipsed, however, by the broader, constitutionally based standards for libel articulated by the U.S. Supreme Court. Today, good faith or not, expressions of pure judgment are not subject to libel lawsuits. (Common law privileges are covered later in this chapter.)

In recent years media defendants increasingly have won early summary judgments in libel cases because judges have declared the offending statements to be protected opinion rather than assertions of fact. This fact/opinion distinction has become so important in the disposition of libel cases that it was made an explicit part of this book's working definition of *libel* (a false allegation of fact disseminated about a person that tends to injure that person's reputation). The problem, however, is that this distinction is far more difficult than it first appears.

### ***Scope of Protected Opinion***

The constitutional protection for opinion is substantial, but it is not so broad as to automatically protect all statements that happen to be labeled “opinion” or are preceded by the words *I think*. According to the Supreme Court, the issue is whether the statement in question has some specific factual content that a plaintiff could prove false, as required under *Hepps*. This was made clear by the Supreme Court in the 1990 case of *Milkovich v. Lorain Journal Co.*, where the

court admonished the lower courts for interpreting too broadly the scope of constitutionally protected opinion.

The case was filed by a high school wrestling coach, Milkovich, whose team had been involved in a brawl and then placed on probation by a state athletic association. In a legal proceeding successfully challenging the probation, Milkovich testified about his role in the altercation. In the following day's newspaper, sports columnist Ted Diadiun, who had witnessed the brawl and the testimony, wrote that Milkovich had "lied at the hearing"<sup>24</sup> in order to avoid the probation. The column appeared under the standing title "TD Says. . . ."

Milkovich sued for libel, but the Ohio appellate court ruled that the accusation of lying, in light of its context in a piece of commentary, was constitutionally protected opinion. The U.S. Supreme Court reversed, and in the majority opinion Chief Justice William Rehnquist wrote:

Expressions of "opinion" may often imply an assertion of objective fact. If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. . . . Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." . . . *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection. . . .

We are not persuaded that . . . an additional separate constitutional privilege for "opinion" is required to ensure freedom of expression. . . .<sup>25</sup>

The chief justice then wrote that the key questions were simply (1) whether the column reasonably implied that Milkovich actually lied in court (as opposed to the column's making that allegation in pure jest) and (2) whether the charge is sufficiently factual to be proved true or false. Rehnquist concluded it was.

### ***Application of the Principle***

Under the constitutional rule, then, it is important to isolate the defamatory statement and ask whether it states or implies a provably false assertion of fact. Suppose someone writes that a professional football coach is part of an illegal gambling operation and bets thousands of dollars on his own games. These are verifiable assertions of fact, and they could be the basis for a libel lawsuit. On the other hand, suppose someone writes that the coach is one of the ugliest men in professional sports. This most likely becomes a protected expression of opinion—a loose, judgmental statement that cannot be proven one way or the other by reference to some accepted standard.

Between these examples, though, lies a vast, murky area where context may indeed be important because of the need to determine the sense in which words

were used. Is it a provably false assertion of fact to label someone an idiot? a witch? a fascist? a racist? a traitor? The answer is, it depends.

Although *Milkovich* made it clear that the context of an opinion column does not automatically protect the otherwise factual allegations therein, context may nevertheless be critical to determining the sense in which words were used. Just as context determines if words were used in a reputation-reducing sense, context also determines whether words were used in a factual sense. Specifically, in murky cases the courts are likely to consider such factors as the common usage of the challenged language; the type of column, book, or program in which the statement appears; and the broader social circumstances in which the statement was made.<sup>26</sup> Some examples of recent opinion rulings:

In a high school newspaper, a math teacher was described as a “babbler” and “the worst teacher” at the school. The teacher sued the school district, the principal, the newspaper adviser, and the students who made and reported the statements. A California court held the statements to be incapable of being proved true or false and thus protected opinion under the First Amendment.<sup>27</sup>

The former principal of an elementary school sued parents over statements that were made during a campaign to remove her. One parent told reporters that the principal was “insensitive” to the needs of the community and that she was a “racist.” A federal court held these assertions to be constitutionally protected opinion in this context, merely forms of name-calling that were not objectively verifiable. On the other hand, assertions that the principal was “sick” and “under a doctor’s care” and that she was “using an illegal testing system” were deemed allegations of fact. They were of precise meaning and were objectively verifiable, the court said, and thus could be grounds for a libel lawsuit.<sup>28</sup>

A Texas television station prepared an investigative report on the work habits of Dallas County’s criminal district court judges by obtaining courthouse parking records. The aired report stated that “records suggest” a particular judge leaves the courthouse early 67 percent of the time, works only a half-day 50 percent of the time, and appears to work an average work week of about 27 hours. The caveat “records suggest” does not insulate appellants’ statements as protected opinion, a Texas appellate court ruled, because the statements in the investigative report nevertheless implied verifiable assertions of fact.<sup>29</sup>

In 2002 the federal Court of Appeals for the First Circuit stated the First Amendment–linked principle this way: “Even a provably false statement is not actionable if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts.”<sup>30</sup> The author of a book had been sued for libel because he asserted that the plaintiff, a figure in a groundwater contamination controversy, had “lied” at a deposition. The court said that in context, however, the reader would take this as just one possible conclusion, as the author’s surmise, because the book provided all the underlying facts from



which readers could draw their own conclusions. Therefore, the assertion of lying in this case was deemed protected, and summary judgment was affirmed in favor of the defendant.

Now reconsider the Hypothetical at the beginning of this chapter, keeping the Supreme Court's *Milkovich* approach in mind. Which statements about the sheriff are protected opinion and which are factual assertions that may lead to liability? A good case could be made that some of the terms used in the ad are too judgmental to be provable as false—terms such as *lazy*, *slob*, and *spineless politician*. Normally, these are words with no objective standards for meaning. However, some danger exists that, in the context of this ad, the term *spineless* might reasonably be understood to imply specific underlying facts, such as collaboration with criminals. This potential problem can be avoided in many cases if writers make known the underlying bases for their conclusions (for example, “He’s a spineless politician because his stands on the issues are not tough enough”). In the Hypothetical, two of the remaining allegations—that the sheriff appears to take bribes and may soon be indicted—are almost certainly factual assertions that would support a lawsuit under the *Milkovich* test.

Determining that certain statements are protected as opinion under the law does not necessarily mean that the language is acceptable under standards of professional ethics, of course. Profane or emotional mudslinging is generally avoided by mainstream media unless it appears in a highly newsworthy quotation. Furthermore, audiences are ethically entitled to know the grounds for opinions expressed by mass communicators—a major problem with the ad in the chapter Hypothetical.

### **State Protection of Opinion**

Although in *Milkovich* the Supreme Court said there is no blanket First Amendment protection for otherwise factual-sounding statements that appear in opinion contexts, the states are free to add such protection if they wish—or at least a greater degree of contextual protection than the constitutional minimum articulated in *Milkovich*.

In 1991 New York state’s highest court became the first specifically to disagree with the *Milkovich* approach and to add presumed contextual protection for opinion under state law. The New York case arose when a medical company sued over a letter published in a scientific journal that criticized the company’s treatment of research animals. The court ruled that letters to the editor and other forms of commentary automatically deserve greater protection from libel lawsuits because the context in which they appear makes it clear that they tend to convey opinion more than fact. Wrote the court: “We believe that an analysis that begins by looking at the context of the whole communication, its tone and apparent purpose, better balances the values at stake than an analysis that first examines the challenged statements for expressed and implied factual assertions.”<sup>31</sup>

## PUBLICATION

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Because libel law is intended to protect reputation, it is a logical requirement of the tort that the defamatory statement be disseminated to people other than the plaintiff. To win a libel suit, the plaintiff must show that the defendant intentionally communicated the defamatory statements to at least one other person, the so-called third party.

This dissemination element, called **publication** in libel law terminology, is relatively straightforward, and in mass communication cases it is rarely an issue. In most libel lawsuits against mass communicators, the statements in question were clearly disseminated to thousands, even millions, of third parties.

One point about publication that is often misunderstood, however, is that each person who repeats a libelous statement has separately met the requirements of dissemination and commits a separate tort. It is no defense that you, as a disseminator, were not the originator of the statement. As one court put it in 1896: “Talebearers are as bad as talemakers.”<sup>32</sup> Again, this is logical. Particularly in instances of republication by today’s mass media, the medium may cause far more reputation damage than the original source of the defamatory remarks.

In practice, this means that attributing the libelous statements to someone else is of no help to the mass communicator. It is not enough that professional communicators accurately quote someone else and clearly attribute the quote. When the media republish, they take legal responsibility for the content of the quote. Some states are carving out a narrow exception to this rule, often referred to as the neutral reporting privilege. But it is very important to understand the general rule on republication, for it is a major constraint on mass communicators.

Perhaps the best illustration of this principle is the publication of letters to the editor in newspapers and magazines. Cases from many jurisdictions have established that these media may be liable for the content of published letters, even though it is clear that the media defendant is not the original source of the libelous statements. Similarly, the media may be responsible for libel contained in advertising, if they were aware of the defamatory content.

In the chapter Hypothetical, therefore, clearly labeling the submission about the sheriff a “political ad” would not automatically protect the newspaper or its advertising manager against tort liability for the content. The key question will instead occur later, in the section titled “Fault,” when it is asked whether the newspaper had reason to know the content was false and defamatory.

In the chain of liability, each person and entity that takes part in the publication and republication of defamation may be named as a defendant in the lawsuit. This includes the original source; the corporate entities of media that disseminate the libel (but not the stockholders); and individual publishers, station owners, editors, and writers.

## IDENTIFICATION

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In addition to showing that a defamatory and false statement of fact has been disseminated, a plaintiff also must prove that the libelous statements were reasonably understood to apply to him. Or, as this element is stated in many of the libel cases and statutes, the defamatory content must specifically be “of and concerning the plaintiff.”

The plaintiff need not be identified by name, so long as other information led some of those who heard or read the defamatory statements to believe, reasonably, that this particular plaintiff was the person portrayed. Physical descriptions, job titles, nicknames, or circumstantial information may be enough to establish identification.

Note that here again the critical question is the reasonable interpretation by members of the audience, not the intent of the defendant communicator. The fact that a libel defendant might have intended the defamatory statements to refer to another person, not to this plaintiff, is irrelevant. Therefore, media writers have a legal reason to get in the habit of identifying people completely—by name, age, city, and occupation, for example. Even when writers disseminate information that is entirely accurate about the people to whom they intended to refer, sloppy or negligent identification could lead to a libel lawsuit from a plaintiff unanticipated by the writer.

### SPECIAL PROBLEM: GROUP DEFAMATION

The identification element often becomes an issue when the defamatory content is directed against a group. The question then is whether individual members of the group can claim that the defamatory statements specifically referred to them.

As a general rule, when defamatory statements refer to a large group or class of people, individuals from the group cannot sue for libel unless they were specifically singled out. Statements about ethnic groups, political parties, religions, professions, or geographic regions fall under this rule. The theory is that these kinds of statements are understood by reasonable people as gross generalizations and that, even when references are to all members, this cannot be taken literally.

For example, an organization of game hunters and four of its members sued CBS News over a 1975 documentary *The Guns of Autumn*, which was critical of sport hunting. The plaintiffs alleged that CBS defamed American hunters, and especially those in Michigan, when it emphasized the slaughter rather than the spirit of the hunt. The individual hunters' claims were tossed out of court, however: “Vague, general references to a comparatively large group [in this case, more than a million Michigan hunters] do not constitute actionable defamation.”<sup>33</sup> Similarly, the hunting organization itself was not specifically implicated as a proponent of

## QUICK



## CHECK

### Was It Libelous?

- Would the communication—either on its face, in light of outside facts, or by implication—tend to injure someone's reputation?
- Is the communication provably false?
- Could the audience reasonably believe the communication referred to this particular individual?

the questionable hunting practices depicted, so its defamation claim, too, was deemed without merit.

At the other end of the scale, defamation directed at all members of a small group does give rise to libel claims by each of the individual members. In this case, readers or listeners could reasonably assume that the statements truly concerned all individuals. When is a group considered small? According to the *Second Restatement of Torts*, "It is not possible to set definite limits as to the size of the group or class, but the cases in which recovery has been allowed usually have involved numbers of twenty-five or fewer."<sup>34</sup> In a few reported cases, libel claims have been allowed for groups as large as fifty or more, however.

The final group libel scenario involves defamation aimed at just some or a few members of a small group. Should all members of the group be allowed to recover for libel? The courts are divided on this question, but it would be wise to assume that this is still a dangerous practice. In a classic group defamation case from 1952, three classes of Neiman-Marcus department store employees sued over the contents of a book. The authors wrote that "most" of the twenty-five salesmen in the Dallas store were "fairies," that "some" of the nine models were "call girls," and that an undisclosed portion of the 380 saleswomen were also "call girls." The federal court dismissed the libel claims of the individual saleswomen, but it allowed the lawsuits by the models and salesmen.<sup>35</sup>

## FAULT

It is well established today that when mass communicators are sued for libel, the plaintiff must prove some degree of fault on the defendant's part. This wasn't always the case, however. Traditionally, libel was a **strict liability** tort. This meant that if the defendant intentionally disseminated information that turned out to be defamatory and false, the plaintiff could win a lawsuit even if the defendant had taken all customary precautions to ensure that the information was true.

By way of analogy, suppose that while you were driving you collided with another car at an intersection. Strict liability would mean that you could be held legally responsible for the other driver's injuries without a court even asking

whether you were at fault. You might have taken all the precautions of a defensive driver, but you would still be held liable—simply because you were driving, an accident occurred, and someone was injured. Of course, the law doesn't work this way with regard to traffic accidents, and today it doesn't work this way with libel either.

It was with this element—fault—that the U.S. Supreme Court first infused constitutional standards into state libel law. And the significance of this infusion could hardly be overstated. Requiring that some fault be shown shifted the balance from a tort in which plaintiffs generally held the upper hand to one in which mass media defendants have the breathing space—in some cases, great breathing space—to make “honest mistakes.” Why did the Court see fit to mandate this additional element, which is sometimes referred to as the media's *constitutional privilege*? The reasons are well illustrated in *New York Times Co. v. Sullivan*,<sup>36</sup> the landmark 1964 case that was the Supreme Court's initial foray into libel law.

## **NEW YORK TIMES CO. V. SULLIVAN**

The *New York Times* had carried a full-page political advertisement titled “Heed Their Rising Voices,” in which a committee of civil rights activists in the South charged that peaceful student demonstrations were being met with a “wave of terror.” The ad described several alleged events to illustrate government suppression. Among them were claims that, after a student demonstration, police armed with tear gas and shotguns in Montgomery, Alabama, ringed the college campus and later padlocked the student dining hall. It also charged that authorities bombed the home of Martin Luther King, Jr. and harassed him with seven arrests for minor offenses.

The problem was that these accounts of events were not accurate. Though police were deployed near the campus in large numbers, they never did ring the campus or padlock the dining hall. King's home was indeed bombed, but police were not implicated, and King had been arrested just four times, not seven.

L. B. Sullivan, the Montgomery commissioner responsible for the police department, sued the *Times* under Alabama's common law of libel. Though he was not mentioned by name in the ad, he claimed that the charges against police would be read as referring to him. A jury awarded Sullivan \$500,000 in damages, the full amount claimed, and the Supreme Court of Alabama affirmed. This brought the case to the U.S. Supreme Court where, for the first time, the Court was faced with the issue of whether the First Amendment limits the states' power to award libel damages, in this case under a rule of strict liability.

In a unanimous ruling the Court reversed the judgment. Justice William Brennan wrote the opinion for the Court, in which he focused on the basic First Amendment principle that speech concerning public issues and officials should be free and uninhibited. Libel awards based on inadvertent errors could have

a marked chilling effect on such speech. Therefore, he said, public officials could recover libel damages only when the defamatory statement was made with “actual malice.” (See the Case Excerpt that follows.)

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## ***New York Times Co. v. Sullivan***

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**376 U.S. 254 (1964)**



From the opinion of the Court by Justice Brennan:

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct. . . .

We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . . The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent. . . .

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . “self-censorship.” Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.

. . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . .

There is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times’ own files. The mere presence of the stories in the files does not, of course, establish that the Times “knew” the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times’ organization having

responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing "attacks of a personal character"; their failure to reject it on this ground was not unreasonable. We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. . . .

The judgment of the Supreme Court of Alabama is reversed. . . .<sup>37</sup>

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Thus a new standard was added to the law of defamation in all jurisdictions. And in *Sullivan's* case, the Court also ruled the evidence insufficient to find "actual malice" in the *Times's* failure to discover and remove the ad's misstatements. It is important to understand the justification behind the Court's new fault requirement. It is not necessarily that defamatory falsehoods, in themselves, deserve to be protected. Rather, it is that some latitude for inaccuracies is necessary in order to safeguard truthful expression. The truth defense by itself is not enough, Justice Brennan wrote. As long as strict liability is the rule, it is more than just falsehoods that will be deterred. The media would tend to steer wide of the unlawful zone, and thus the law would have a chilling effect on truthful speech as well.

For example, if newspapers were to lose cases such as this, where at the time of publication they had no reason to doubt the veracity of the statements, they would feel pressured to play it safe by rejecting similar political advertising altogether. Even a line-by-line fact check would not insulate the paper, because heretofore reputable sources could turn out to be wrong. By injecting the fault standard into libel law, the Court gave the media a better chance to control their own fate.

Until Justice Brennan's opinion in the *Sullivan* case, the Supreme Court had never acknowledged that defamatory speech deserved any constitutional protection against civil lawsuits. This was true for the vast majority of state courts as well. One reason the judiciary had not accepted a First Amendment defense is that the amendment had historically been viewed only as protection against direct government action. But in *Sullivan*, the Court noted that government support of civil laws that place unreasonable burdens on the press can be just as offensive to constitutional liberties as a state criminal law that punishes the media.

Requiring some showing of fault is a reasonable enough proposition. Unfortunately, however, what has followed the *Sullivan* case has been a tortured,

confusing, piecemeal approach to determining precisely how the fault element should work. Today a thorough assessment of communicators' potential liability means deciding exactly what degree of fault the plaintiff must prove, and this, in turn, depends upon who the plaintiff is.

## THE MEANING OF ACTUAL MALICE

In *Sullivan* the plaintiff was a government official, and he was therefore required to prove a degree of fault called actual malice. This is a high degree of fault that has nothing to do with *malice* as that word is commonly used, to mean spite, ill will, or hatred. **Actual malice**—sometimes referred to as **constitutional malice**—means that when the defamatory statements were published, the communicator either (1) knew they were false or (2) published with reckless disregard of truth or falsity—that is, with serious doubts that the statements were true.

Today the actual malice standard applies in cases where the libel plaintiff is a public official or a public figure. The section “Categorizing the Plaintiff” will look more closely at how these determinations are made. But first, it is necessary to take a closer look at the actual malice standard.

### *State of Mind*

The question in actual malice inquiries is what the defendant actually believed at the time of publication, not simply whether a prudent person would have published or whether most professionals would have done more checking. This presents a difficult task for plaintiffs. Furthermore, not only must certain plain-tiffs demonstrate that the defendant acted with actual malice, but this fact must be proved by “clear and convincing evidence.” This heightened degree of proof makes the actual malice standard even tougher for plaintiffs to overcome. Yet case results show that the actual malice requirement is not insurmountable. Remember that the civil discovery process includes powerful methods for uncovering evidence.

A 1979 Supreme Court ruling established that plaintiffs faced with proving actual malice may inspect a writer's notes and compel answers to detailed questions in order to piece together circumstantial evidence of the defendant's actual state of mind during the editorial process. The case, *Herbert v. Lando*,<sup>38</sup> involved a *60 Minutes* broadcast in which a retired army colonel, Anthony Herbert, claimed he was wrongly depicted as a liar. The broadcast concerned Herbert's public accusations that the military had covered up atrocities committed by U.S. troops in Vietnam.

In his effort to prove actual malice against the producer of the *60 Minutes* segment, Herbert's lawyers pressed for thousands of pages of detailed testimony. The defendant protested, arguing that such inquiries into an editor's state of mind



would produce an unconstitutional, chilling effect on speech. But the Supreme Court disagreed, holding that such an inquiry is valid as long as it is directed to producing evidence relevant to the proof of actual malice.

### **Knowing Falsehood**

Actual malice can be proved most easily when a defendant simply fabricates defamatory “facts” out of thin air. Making up a story and presenting it as fact would, of course, amount to publication of a known falsehood—one of the two ways to establish actual malice. Equally egregious would be publishing statements fabricated by someone else while knowing that the material was indeed fiction. Fortunately, very few lawsuits against professional communicators actually involve such gross abuse of journalistic license.

What if a writer concocts quotations and attributes them to a source, perhaps believing that the fabricated quotes are a reasonable interpretation of what the speaker said, but knowing full well that the passages aren’t really direct quotes? In the 1991 case of *Masson v. New Yorker Magazine, Inc.*,<sup>39</sup> the Supreme Court addressed this more problematic angle to “knowing falsehood.” The case concerned an article about Jeffrey Masson, a controversial psychoanalyst who had been interviewed by a writer for the *New Yorker*. Masson claimed that several passages in quotation marks, which were attributed to Masson and amounted to boastful self-description, were deliberately fabricated and injurious to his reputation. Furthermore, he argued that falsification of quotations should automatically constitute publication with knowing falsity—and thus actual malice.

The Supreme Court did not entirely agree. It held that deliberate alteration of the words uttered by a plaintiff, even if more substantial than the correction of grammar or syntax, does not equate to knowledge of falsity for actual malice purposes unless the alteration changes the meaning conveyed by the statement. Placing quotation marks around substantially accurate paraphrases, though a poor journalistic practice, is not evidence of actual malice for purposes of a libel lawsuit.

On the other hand, wrote Justice Anthony Kennedy for the Court, readers assume that a passage in quotation marks reproduces the speaker’s words verbatim, and hence, erroneous quotations may be a particularly “devastating instrument” for conveying false meaning. The Court said that false quotations can defame the person to whom they are attributed in at least two ways: first, by the falsity of the factual assertion in the quote; second, by the false attribution of the remark to this particular speaker, regardless of the truth or falsity of the statement within quotation marks. A false attribution alone may injure reputation, because the manner of expression or even the mere fact that the statement was made could indicate a negative personal trait that the speaker does not actually possess. Therefore, the deliberate alteration or fabrication of a quotation, if it substantially changes the substance of a person’s remarks, is a statement made with knowledge of falsity for purposes of proving actual malice. This may be true, said the Court,

even if the writer at the time thought, mistakenly, that the made-up quotes were a reasonable interpretation of what the speaker said.

In the *New Yorker* article, Masson is quoted as referring to himself as an “intellectual gigolo” and the “greatest analyst who ever lived.” The Supreme Court sent the case back down to the lower court to determine whether the quotes attributed to Masson were indeed significantly different from Masson’s actual statements. In 1994, a jury found the article nonlibelous.

### ***Reckless Disregard***

“Reckless disregard” might be established if a news story were based wholly on unverified information from an anonymous telephone call or from a caller with a history of unreliability. And in some cases, the facts of a story may be so inherently improbable that to disseminate them without verification would smack of reckless disregard for the truth. The key is whether the communicator had ample reason to be highly suspicious of the information at the time and chose to run it anyway.

Still, sloppy or even unethical journalistic practices do not, by themselves, equate to reckless disregard for the truth. Nor is a communicator’s motive a deciding factor in this inquiry. Rather, these facts are just part of the overall relevant circumstances that may be considered by a jury when determining whether a libel defendant was reckless with the truth.

In *Harte-Hanks Communications, Inc. v. Connaughton*, the U.S. Supreme Court in 1989 agreed unanimously that an Ohio newspaper had published information about a judicial candidate with actual malice. The plaintiff in the case, Daniel Connaughton, lost a local judgeship election after the newspaper reported a woman’s allegations that he had promised jobs, fancy dinners, and a Florida vacation to her and her sister “in appreciation” for her help in providing information about corruption in the incumbent judge’s office.

The Supreme Court found clear and convincing evidence of actual malice in the following facts:

1. The woman’s allegations had been denied by Connaughton and five other witnesses before the story was published.
2. Connaughton had made tapes of conversations with the woman’s sister available to the newspaper, but no one there had bothered to listen to them.
3. No attempt had been made to interview the source’s sister, though she was closely connected to the allegations.
4. A tape of the interview between the newspaper and the source evidenced inconsistencies and other reasons to question the veracity of the charges.

Wrote Justice Stevens for the Court:

It is likely that the newspaper’s inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the

woman's] charges. Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.<sup>40</sup>

Simple failure to investigate, even when coupled with feelings of ill will by the defendant toward the plaintiff, is not enough to establish that the defendant published a known falsehood or with reckless disregard. This is illustrated by another 1989 case in which the World Boxing Council sued sportscaster Howard Cosell over comments contained in his book *I Never Played the Game*. The book referred to the organization as “a conspirator in rigging ratings” and an “instrument of extortion.” Wrote the federal District Court:

[T]he WBC argues that Cosell harbors ill-will towards the WBC, and that Cosell failed adequately to investigate the charges he lodged at the WBC in his book. Even conceding the truth of these factual assertions, it does not follow that Cosell knew or should have known that the allegations in his passage were false.<sup>41</sup>

But obvious signs of ill will, particularly evidence of an intention to harm someone's reputation, may be considered relevant support for charges that the defendant invented the defamatory information. In a 1983 Mississippi case, for example, statements by the defendant writer that “I've got him now” and “I tore him up,” coupled with testimony that the defamatory statements “were made up through anger,” were considered sufficient to prove actual malice.<sup>42</sup>

An issue in many cases is the hectic pace of decision making that typifies media professionals working on deadline. The deadline environment may breed careless decisions, but haste alone does not equate to actual malice. This point is illustrated by a 1994 case in which a newspaper carried a story based on an Associated Press dispatch labeled URGENT. The dispatch had also been marked MORE, indicating that additional information about the story would soon arrive. But the journalist did not wait for the additional information and prepared a story based on the initial dispatch alone. Though the second dispatch did arrive before deadline, the journalist never saw it. The plaintiff claimed that the story would not have been libelous had the journalist incorporated the second dispatch, and the failure to do so was offered as evidence of actual malice. The federal Court of Appeals disagreed. Even though the journalist was alerted to expect additional information and went ahead without it, the court held this did not prove the journalist had serious doubts about the accuracy of the story crafted on the first dispatch.<sup>43</sup>

Consider once again the chapter Hypothetical. If you were to publish the line about a pending criminal indictment of the sheriff, would you have done so without actual malice? From the information provided in the Hypothetical, you did not know that to be a falsehood. But would you be publishing with serious doubts about its accuracy (reckless disregard)? The group sponsoring the ad was reputable. But reporters at your paper gave you actual reason to doubt the truth

of that charge. This would not look good before a jury and might well qualify as reckless disregard for the truth.

## **GERTZ AND THE NEGLIGENCE STANDARD**

For nearly a decade following the *Sullivan* case, the Supreme Court consistently expanded application of the actual malice standard to a wide range of “public” plaintiffs. In 1971 a fractured Supreme Court, led again by Justice Brennan, decided to take an even bolder approach and extend the standard to any case in which the content of the offending communication was of general public concern. In *Rosenbloom v. Metromedia, Inc.*, the Court plurality decided that the constitutional buffer against libel laws should depend not on the status of the plaintiff, but on the subject matter of the communication.

Thus the Court in that case required the libel plaintiff, a distributor of nudist magazines, to prove actual malice in his lawsuit against a Philadelphia radio station. The defamatory statements were made in the context of news reports on the distributor’s arrests for allegedly selling obscenity—clearly a matter of legitimate public concern. Wrote Justice Brennan:

We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.<sup>44</sup>

The *Rosenbloom* approach seemed both logical and less complicated than previous practice. It was short-lived, however.

### ***The Gertz Ruling***

In 1974 a majority of the Supreme Court decided that the *Rosenbloom* approach granted too much latitude to mass communicators and trod too heavily upon state libel laws protecting the reputation of private individuals. So in *Gertz v. Robert Welch, Inc.*, the Court retrenched. It reverted to the approach in which the constitutional malice standard is triggered by the public status of the libel plaintiff—the approach still followed today.

The *Gertz* case involved a libel lawsuit by a respected Chicago attorney, Elmer Gertz, against *American Opinion*, a magazine disseminating the views of the far right-wing John Birch Society. Gertz had earlier filed a civil lawsuit on behalf of the family of a young man shot by a police officer. On that basis *American Opinion* reported, falsely, that Gertz was part of a giant communist conspiracy to destroy local police departments. Gertz lost his libel case in the lower courts because it was held that the article concerned was a matter of public interest and there was no evidence of actual malice by the magazine.

But the Supreme Court reversed, 5–4. It held that Gertz was a private figure and that private figures are in greater need of protection from defamation than public figures, who enjoy greater media access with which to counteract false accusations. Wrote Justice Lewis Powell for the majority: “We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”<sup>45</sup>

So, any libel plaintiff not deemed a public official or public figure is automatically characterized as a private person. And in libel cases filed by private people, the *Gertz* ruling allows each state to determine the precise degree of fault the plaintiff must prove. There is no constitutionally mandated fault standard in private person cases, except that some degree of fault must be shown. The states are not free to impose strict liability on mass communicators.

### ***Reasonable Care***

A few states have decided to require a showing of actual malice in all libel cases against mass communicators, regardless of *Gertz*. But among the states that have specifically addressed the issue, a majority has decided to allow private person plaintiffs to recover upon evidence of mere negligence, a far lesser degree of fault. Remember from Chapter 3 that people are considered negligent when they fail to exercise ordinary or reasonable care. In libel cases, this means that the defendant failed to take the precautions that a reasonable communicator would have taken under similar circumstances to assure that libelous communications were not disseminated.

In most cases, the negligence inquiry focuses on the adequacy of a communicator’s efforts to verify information. It is not necessary that all possible avenues of verification be exhausted in every case, of course. But the question is whether all reasonable efforts were taken, as indicated by the overall circumstances and by custom within the applicable communications profession.

For example, a federal court in 1989 held that the newspaper editors at *USA Today* could be deemed negligent for condensing a twenty-minute interview into a single paragraph of quotes and then failing to verify their accuracy—either with the original source or with the part-time correspondent who had relayed the entire interview to the editors by telephone. The court wrote:

This is especially so in a case like this one, where (1) time was not a critical problem (there were four full working days between deadline and publication), and (2) the means of checking were readily at hand (a telephone call to the plaintiff would have prevented the blunder). In light of these facts, we cannot gainsay the jury’s determination that reasonable editors under the totality of the circumstances would have made some further attempt at confirmation.<sup>46</sup>

The reason the negligence standard is much less favored by professional communicators, and what makes it different from the actual malice standard, is that

it essentially invites a jury to impose liability by second-guessing communicators' methods and judgments. In his *Gertz* dissent, Justice Brennan wrote about negligence: "The reasonable-care standard is 'elusive' . . . ; it saddles the press with 'the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.'"<sup>47</sup> In sharp contrast, the known falsehood or reckless disregard standard provides greater certainty for communicators because the focus isn't on what a reasonable person would have done, but on what the communicator actually knew at the time of dissemination.

Still, communicators can be fairly certain of avoiding negligence by observing the basic professional principles that are taught in college journalism courses. Some of the more important principles, from both a legal and an ethical standpoint, are

- Don't rely on information from anonymous phone calls.
- Seek out both sides of a story.
- Provide the targets of defamatory allegations an opportunity to respond.

It is also important that journalists and other communicators behave like true professionals when interviewing others. The legal reason for this is that techniques and offhand comments might later be used against the interviewer—perhaps as evidence of a tendency to be biased or sensationalistic. Juries will not look favorably upon the use of scare tactics or derogatory and exaggerated comments about others during efforts to gain information from a source.

## CATEGORIZING THE PLAINTIFF

Analyzing the facts of a particular libel case under one of the fault standards can be a laborious and inexact process. Equally difficult, however, may be the threshold determination of which standard shall apply. Whether the plaintiff must show actual malice on the defendant's part, or just negligence, is a determination that often will ordain the ultimate outcome of a libel lawsuit. This critical determination is in turn based on whether the plaintiff is a public or a private person. In practice, though, this categorization can be difficult, and courts in the various jurisdictions sometimes reach different conclusions.

In *Sullivan*, the Court required a public official to prove actual malice, and a few years later the requirement was extended to litigation in which the plaintiff is a public figure. For private person plaintiffs, however, it is constitutionally permissible to win a libel lawsuit by showing a lesser degree of fault.

The rationale behind this double standard is based on assumptions about the relative importance of the speech and the reasonable expectations and influence of defamed people. Speech concerning the conduct of public officials is considered, socially speaking, to be among the most important classifications

of speech—speech that goes right to the heart of the First Amendment and the ideals of an open democracy. Similarly, criticism of public figures is of particular public importance because famous people serve as role models and influence policies and events of concern to society at large.

Also, the Supreme Court has noted that both public officials and public figures in most cases have voluntarily exposed themselves to the risks of closer public scrutiny. And in both cases they enjoy greater access to the mass media, where they can counteract defamatory charges. Private people don't have the same opportunity, however, and thus need greater help from libel laws.

For all these reasons, the Supreme Court has chosen to distinguish between public and private libel plaintiffs. When the plaintiffs are public people—**public officials** or **public figures**—mass communicators receive greater constitutional protection through application of the actual malice standard. The next question is, who is a public official or a public figure?

### **Public Officials**

The Supreme Court has loosely defined the term *public official* as applying to “government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs.”<sup>48</sup> Thus the designation of “public official” does not apply to everyone who receives a government paycheck, but neither is it reserved exclusively for the very highest levels of government.

In practice the question is whether the government job carries with it the authority to influence public policy or otherwise to affect directly the health, liberty, or property of the public. In most cases the individual's title and the general nature of the office will provide the answer.

Likely examples of public officials include elected representatives, high-ranking officers in the armed forces, judges, prosecutors, public defenders, county clerks, building inspectors, and, yes, the sheriff in the chapter Hypothetical. In the vast majority of cases, the courts have also deemed police patrol officers to be public officials, with reference to their authority to affect personal liberty. Various school and college authorities, including school board members, principals, and college deans, also have been deemed public officials. More difficult, however, has been the classification of public school teachers, and courts have reached different conclusions.<sup>49</sup>

Even when it is determined that the plaintiff in a libel lawsuit is a public official, the actual malice standard is said to apply only if the defamatory statement pertains to the plaintiff's official conduct. This limitation on the reach of the actual malice rule was stated in the *Sullivan* opinion. However, the limitation is of scant practical significance, because later decisions have clarified that the actual malice rule applies whenever statements might touch on the suing official's

general fitness for office. Even statements about very personal attributes, such as dishonesty or improper motivation, may be germane to fitness for office.<sup>50</sup>

### **Public Figures**

The extension of the actual malice standard to public figures was first announced by the Supreme Court in the 1967 case of *Curtis Publishing Co. v. Butts* and a companion case, *Associated Press v. Walker*.<sup>51</sup> The first case involved a report by *The Saturday Evening Post* that University of Georgia athletic director Wally Butts had conspired with coach Bear Bryant of the University of Alabama to fix a football game between their respective schools. The *Walker* case involved an erroneous Associated Press report that retired Brigadier General Edwin Walker had helped instigate a University of Mississippi campus riot. Because Butts was paid by a private alumni association and Walker had retired from the army, neither of these libel plaintiffs could be classified as public officials. However, both men had acted in such a fashion as to invite public attention and comment, one as a major sports figure and one as a political activist. The Supreme Court declared both plaintiffs public figures to whom the actual malice standard should logically apply. (See Exhibit 4.2 for a chronological summary of important Supreme Court cases pertaining to libel.)

The public figure classification, then, applies to plaintiffs who have assumed special prominence in the resolution of public issues or the character of public events. This determination is generally tougher to make than the determination of who is a public official. As a federal judge once described it, defining public figures is “much like trying to nail a jellyfish to the wall.”<sup>52</sup>

In an effort to better structure the analytic task, courts often further categorize public figures as all-purpose or limited-purpose. **All-purpose public figures** are those who have achieved pervasive fame. They are household names, either across the nation or at least in the region where the defamatory content was published, and they must prove actual malice in regard to virtually any defamatory statement. Film stars, TV celebrities, sports heroes, and big-name social critics may fall into this category. Courts have ruled that entertainer Johnny Carson and author/commentator William F. Buckley, Jr. are all-purpose public figures, for example.

At the other end of the public figure spectrum are **limited-purpose public figures**—those who have entered the public spotlight, but only within a narrow context. As libel plaintiffs they are considered public figures only if the defamation was related to that public context. These are people who have voluntarily thrust themselves into the forefront of specific public controversies in an effort to influence the outcome; they are sometimes referred to as “vortex public figures.”

Typical examples of people who would tend to be limited-purpose public figures are local candidates for public office and their campaign managers, lobbyists, union leaders, top-level corporate executives, and people who lead



**EXHIBIT 4.2** Highlights in the Constitutional Evolution of Libel Law

- 1964** The First Amendment bars a “public official” from collecting damages for defamatory falsehoods relating to his official conduct unless it is shown with convincing clarity that the falsehood was published with “actual malice.” (*New York Times Co. v. Sullivan*)
- 1967** The actual malice standard of *Sullivan* extends to libel lawsuits filed by “public figures” as well as lawsuits by public officials. (*Associated Press v. Walker* and *Curtis Publishing Co. v. Butts*)
- 1971** The *Sullivan* actual malice standard is applicable to all libel lawsuits in which the defamatory communication relates to matters of public or general concern (plurality opinion). (*Rosenbloom v. Metromedia, Inc.*)
- 1974** *Rosenbloom* repudiated; the actual malice standard is not constitutionally required in libel lawsuits brought by “private” persons, though liability may not be imposed without some degree of fault. Plaintiff limited to damages for “actual injury,” however, unless actual malice is shown. (*Gertz v. Robert Welch, Inc.*)
- 1979** During the discovery process a libel plaintiff, who must prove actual malice, may inquire into the details of a defendant’s “mental process” of preparing the communication. (*Herbert v. Lando*)
- 1985** The *Gertz* limitation on damages does not apply in cases where defamatory statements do not involve matters of public concern; in such cases presumed and punitive damages may be awarded without proof of actual malice (plurality opinion). (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*)
- 1986** Trial courts must dispose of libel cases at the summary judgment stage when it is apparent that public-person plaintiffs cannot meet the heavy burden of proving actual malice by clear and convincing evidence, as required by the First Amendment and *Sullivan*. (*Anderson v. Liberty Lobby, Inc.*)
- 1986** A libel plaintiff bears the burden of proving falsity, at least in cases in which the plaintiff seeks damages against a media defendant for speech involving matters of public concern. (*Philadelphia Newspapers, Inc. v. Hepps*)
- 1989** A newspaper’s purposeful avoidance of information that might refute defamatory allegations about a plaintiff is sufficiently reckless to qualify as actual malice. (*Harte-Hanks Communications, Inc. v. Connaughton*)
- 1990** The fact that defamatory statements might be labeled “opinion” is not enough to warrant a constitutional privilege against libel claims if the statements imply an assertion of objective fact. (*Milkovich v. Lorain Journal Co.*)
- 1991** Fabrication of direct quotations does not necessarily equate to actual malice, though it may amount to actual malice if the altered words change the meaning of the plaintiff’s actual remarks. (*Masson v. New Yorker Magazine, Inc.*)

*This list shows the chronological order of some of the U.S. Supreme Court’s most important libel decisions. By no means is it a complete list of the Court’s rulings pertaining to libel.*

the charge on one side of a public controversy—vocal abortion rights advocates, leaders of a grassroots campaign to stop construction of a dam, and so on. Criminal defendants may be limited public figures, but only if they have injected themselves into a preexisting public controversy. Criminal prosecution by itself does not automatically convert the defendant into a public figure under libel law.<sup>53</sup> The plaintiff's position or title alone rarely determines whether limited public figure status shall apply. Rather, courts look to the individual's actual, voluntary involvement in a public debate.

When the plaintiff in a libel lawsuit is a corporation, the determination of public figure status is made in the same way as with individuals. The corporate entity will be deemed a public figure if it had injected itself into the struggle or debate over public issues, such as pollution controls, foreign policy, minority hiring practices, or federal fiscal policy. Generally speaking, large corporations will tend to be public figures, but the determination does not rest on size alone.

In some cases, a corporation's public discussion about the merits of its own product may be a sufficient basis for public figure status. For example, a federal court ruled that a manufacturer of loudspeakers was a public figure for purposes of a lawsuit against *Consumer Reports* magazine, which had published an allegedly defamatory product review. The public figure determination was based on the manufacturer's extensive advertising and publicity efforts, designed to encourage tests and reviews of its product.<sup>54</sup>

Can a person become a public figure involuntarily? For example, how about the bystander who jumps into a freezing river to save a child and now finds herself the subject of media and community attention she never wanted? Or an Air Force pilot, shot down in enemy territory, who escapes to safety only to find his picture now appearing in media across the country? The usual answer is no. Especially where the attention-getting conduct is a single event, and the individual was not actually seeking the attention, courts are not likely to deem the plaintiff a public figure.

Involuntary public figure status is more likely, however, if the plaintiff had engaged in some notorious conduct over a significant period, knowing full well that it could lead to widespread publicity, and had already attracted some media attention. A leading case for this point is *Rosanova v. Playboy Enterprises*,<sup>55</sup> in which *Playboy* magazine had referred to the plaintiff as a "mobster." The federal Court of Appeals declared Rosanova a public figure—even though he had not sought public attention—because he engaged in conduct that was of significant public interest and had been the subject of prior media reports.

### ***Change of Plaintiffs' Status***

Does a public figure always remain a public figure in the eyes of the law? Or does the passage of time convert a person to private person status, thus easing the obstacles to winning as a libel plaintiff? This remains an unsettled point in

defamation law. The U.S. Supreme Court has not ruled directly on this question, and other courts have disagreed.

A person who has been out of the public eye for many years may no longer command easy access to the media and may no longer be said voluntarily to accept the closer scrutiny that comes with the public spotlight—two of the justifications for the public figure distinction in the first place.

Using the standpoint of the greater public interest, however, most courts have reached a different conclusion—at least when the communication related to events that occurred while the plaintiff was in the public eye. In a case involving a plaintiff who had been a limited-purpose public figure forty years earlier, the Court of Appeals reasoned:

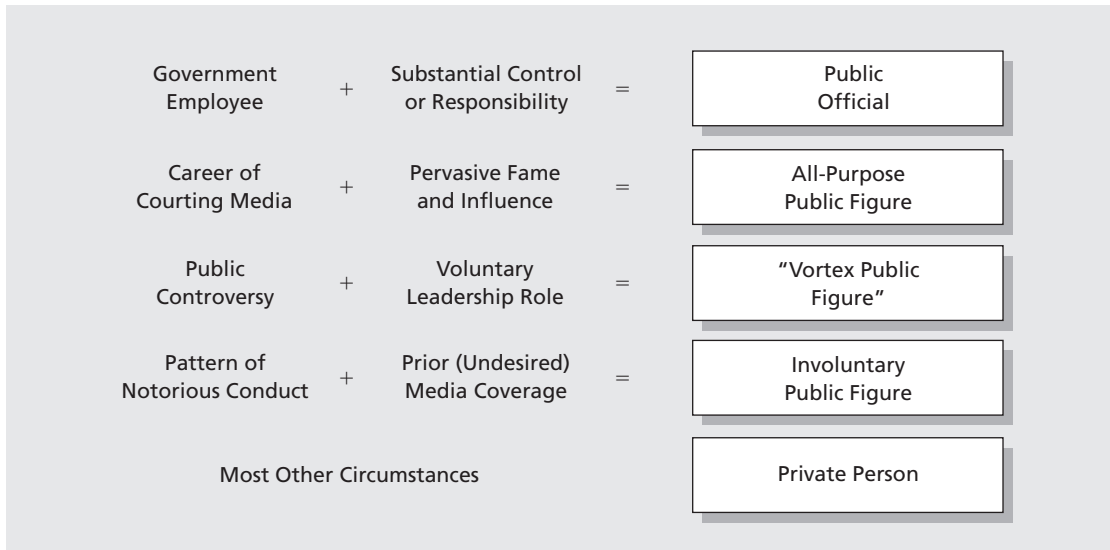
Once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of *that controversy*. . . . The mere passage of time does not automatically diminish the significance of events or the public's need for information. A nation that prizes its heritage need have no illusions about its past. It is no more fitting for the Court to constrain the analysis of past events than to stem the tide of current events.<sup>56</sup>

### **A Practical Warning**

Since 1964, this nation's courts have generated thousands of pages of judicial opinions concerning the proper categorization of libel plaintiffs. Not surprisingly, the critical legal distinction between public and private plaintiffs also tends to be a much-discussed topic in books and courses such as this. Despite the intellectual attention, however, categorizing libel plaintiffs will never become an exact science. Also, not all public figures neatly fit the all-purpose and limited-purpose molds as they have been defined (these definitions are summarized in Exhibit 4.3).

For example, would a *Playboy* magazine centerfold “playmate” qualify as a public figure? A federal court said yes, at least for purposes of an allegedly defamatory satire of *Playboy* that appeared in *National Lampoon*. Though the plaintiff had not actually sought to influence any specific controversy, the court noted that she had voluntarily posed for nude photos and consented to their publication, thereby inviting public attention and comment regarding her role as a model. But another federal court ruled that a “Miss Wyoming,” who had competed in the Miss America pageant and had won several other beauty contests and hundreds of regional and national baton-twirling championships, did not merit the public figure designation in her lawsuit against *Penthouse* magazine.<sup>57</sup>

In terms of practical, day-to-day advice, law firms urge their media clients: Do not assume that individuals portrayed in the media are public figures. The wise practice is generally to assume that potential libel plaintiffs are private figures and may be able to win a libel case on the basis of ordinary negligence. Only when the

**EXHIBIT 4.3** *Classifying the Plaintiff: A Rough Guide*

potential plaintiff is a high-ranking federal government official or a media celebrity of the grandest stature might an assumption of public person status be safe.

## HARM TO PLAINTIFF

As the final element of libel, the plaintiff must provide evidence that he or she actually suffered an injured reputation as a direct result of the defamation. Normally the compensable injuries are not limited to a plaintiff's tangible, out-of-pocket losses. In most cases the bulk of the claimed injuries is intangible—losing esteem in social circles, being shunned by neighbors, suffering personal humiliation, and so on.

Realistically, some people are much more susceptible to reputation damage than others. For example, a heart surgeon with a terrific regional reputation would tend to be highly susceptible to such injury. An erroneous report that the doctor is a drug addict could easily cause reputation damage worth hundreds of thousands or even millions of dollars. But suppose that a drug addict charge is made about a convicted felon—a man who has recently served prison time for burglary, firearms violations, and animal abuse, and who last year was caught by an FBI sting operation because he applied for a job as a hit man with people he thought were members of the mob. In reality, the facts of this person's life may have already led to such a sorry reputation that a false drug claim could hardly damage

it further. In recognition of this reality, courts have occasionally declared plaintiffs with highly unsavory pasts and despicable reputations to be “libel-proof” as a matter of law and therefore incapable of winning a libel lawsuit.<sup>58</sup>

Under the common law as it existed for decades in this country, a libel plaintiff was not actually required to prove the extent of injury. The jury was allowed to presume the extent of harm, taking into account the plaintiff’s prior reputation, the harshness of the defamation, and the scope of dissemination. This procedure has been greatly restricted by the Supreme Court, however.

## AWARDING DAMAGES

The only legal remedy available to a libel plaintiff is to recover money, because courts will not enjoin publication of potential libel. Whether or not the injury to a defamed person is financial in nature, the jury will decide upon a monetary award for the plaintiff in order to compensate for the harm. This award, called **compensatory damages**, may be further subdivided into three categories (these terms are worth noting because they often appear in cases and statutes dealing with libel):

**Presumed damages**—the broadest category possible, based on a jury’s presumption of what the harm is likely to be

**Actual damages**—an award based strictly on evidenced harm, of any kind

**Special damages**—an award limited to evidenced harm of a direct, monetary nature

In addition to compensatory damages, most states have traditionally allowed juries to tack on an award of **punitive damages** when the defendant’s behavior was shown to result from spite or other detestable motives. These additional damages are for the sake of example, as a way of punishing the defendant in the context of a civil lawsuit.

There are no solid standards for ascertaining the dollar value of a plaintiff’s injured reputation, so juries have great latitude in awarding compensatory damages. Trial and appellate judges have the authority to reduce jury awards that are grossly excessive, but only rarely are judges willing to upset juries’ determinations. Similarly, few guidelines exist for setting the amounts of punitive damages. In some cases, they have amounted to several times the amount of compensatory damages. For example, in 1989 a Pennsylvania court upheld a libel verdict against the *Pittsburgh Post-Gazette* that was just \$200,000 in compensatory damages but \$2 million in punitive damages.<sup>59</sup>

With the 1980s came the advent of so-called mega-verdicts in libel law. In that decade, juries in more than two dozen cases awarded damages in excess of \$1 million. Although the majority of these awards were overturned or reduced on appeal, media professionals and their lawyers began warning that such awards, particularly in the punitive category, could have a stifling effect on freedom of speech.

## LIMITS ON DAMAGES

The U.S. Supreme Court has injected just two constitutional limitations on damage awards, and those were announced in the *Gertz* case back in 1974. First, the states' common law doctrine of presumed injury was greatly restricted. Wrote the Court:

The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. . . . It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.<sup>60</sup>

So, private figure plaintiffs at trial must offer solid evidence of their injuries, both tangible and intangible, unless they can prove the higher standard of fault, actual malice. States may no longer allow awards of presumed damages, at least in libel cases involving matters of public concern, unless actual malice is proved.

The second restriction laid down in *Gertz* is that punitive damages may not be awarded unless, again, the libel plaintiff proves actual malice on the defendant's part. Although the *Gertz* ruling eased the constitutional fault requirement in libel cases brought by private people, it also withheld from plaintiffs the potential windfalls—punitive damages and damages based on presumed injury—unless the plaintiff proves additionally that the defendant is guilty of actual malice.

Remember that these restrictions are constitutional minimums, that is, limitations deemed necessary under the First Amendment so that adequate breathing space would exist for freedom of speech. And though the Supreme Court has declined in recent years to require further restrictions on awards of libel damages, the individual states are free to do so and have done so. A few states prohibit punitive damages for libel altogether,<sup>61</sup> and many other states require a showing of “common law malice” (ill motives) as well as constitutional actual malice before punitive damages may be obtained. Furthermore, both state and federal courts are free to reduce awards of punitive damages that they deem to be “grossly excessive.”

## MATTERS OF PRIVATE CONCERN

Most of the Supreme Court's libel decisions, and most of this chapter, deal with cases in which the defendants were mass media—newspapers, TV networks, and so on—and the offending communication naturally related to news or commentary on a matter of broad public interest. Communicators may receive lesser First Amendment protection against libel lawsuits, however, when the communication in question was of a purely self-serving or private nature.

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, a plurality of the Supreme Court limited application of the *Gertz* standards to public-oriented communications. In *Greenmoss* a credit reporting agency had issued a confidential report to several subscribers stating that a contractor, Greenmoss Builders, had filed for bankruptcy. The report was in error, however, and the contractor sued for libel. In state court the contractor was awarded both presumed and punitive damages, even though actual malice was never shown. But the U.S. Supreme Court affirmed, holding that the rule of *Gertz*, which prohibits awards of presumed and punitive damages without a showing of malice, does not apply when the defamatory statements do not involve matters of public concern. The plurality opinion states:

We have long recognized that not all speech is of equal First Amendment importance. It is speech on “matters of public concern” that is “at the heart of the First Amendment’s protection.” . . . In contrast, speech on matters of purely private concern is of less First Amendment concern. . . . While such speech is not totally unprotected by the First Amendment . . . its protections are less stringent.<sup>62</sup>

*Greenmoss* leaves many important questions for the future. For example: Could the contents of mass communications ever be deemed not of public concern? What if this same, mistaken bankruptcy report had appeared as a news item in a newspaper? What about the self-serving, commercial pitches of advertisers?

This public concern distinction raised in the *Greenmoss* case is one that professional communicators will need to watch carefully. Recall that when a public concern classification was proposed in *Rosenbloom*, it was later rejected by the Supreme Court in *Gertz*. Yet in two later cases, *Greenmoss* and *Hepps*, the Court again used the qualifying language “matter of public concern,” thereby indicating that some degree of subject matter classification is still alive and that it may determine precisely which libel safeguards apply. (Recall that in *Hepps* the Court said private person plaintiffs had the burden of proving falsity in cases involving matters of public concern.) The Supreme Court has not announced criteria for distinguishing subjects of public concern from subjects of private concern. For now, though, *Greenmoss* at least serves as a warning that the law of libel is still evolving.

## PRIVILEGES, DEFENSES, AND OTHER PROTECTIONS

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This chapter so far has focused on the elements that plaintiffs must prove in order to win a libel lawsuit against mass communicators. You should recognize that, under the common law of the states, and particularly under the additional constitutional limitations laid down by the Supreme Court, considerable protections for communicators are built into these elements.

Even if libel plaintiffs can prove the basic elements of the tort, they are not guaranteed victory. This is because the law recognizes more than a dozen additional defenses, privileges, and procedural protections that may shield defendants from liability for defamation. This section considers just a few of those protections—the ones that are most important to professional communicators. (Two of the most important common law privileges, truth and fair comment, were incorporated in the section titled “Falsity.”) This section also looks at other means by which mass communicators can at least diminish or discourage libel claims.

## REPORTS OF OFFICIAL PROCEEDINGS

For newsmen, particularly, one of the most useful protections is the privilege to report fairly and accurately what is said in official government proceedings. Known as the **fair report** or **public record privilege**, it is premised on the public’s overriding right in a democratic society to be informed about the functioning of government and the behavior of government officials. Therefore, media may republish or broadcast allegations made in official proceedings even, in most states, when the media know the allegations are defamatory or false. Obviously, this is a major exception to the rule that anyone who repeats defamation is independently liable for it.

For example, suppose that during a city council meeting, the chief of police testifies that the student body president of the local college is running a prostitution ring out of a campus dorm. The testimony is defamatory, and you might even suspect it is false. But under the fair report privilege, the public’s right to know how its police chief is performing takes priority over the student’s ability to sue for defamation, so you would be free to report the chief’s remarks. (By the way, those participating in the official proceeding—such as city council members or witnesses—also enjoy a privilege to speak their minds in good faith.)

### ***A Qualified Privilege***

In most jurisdictions this is a conditional, or qualified, privilege, not an absolute one. That’s because the privilege applies only so long as communicators live up to their end of the bargain. Specifically, they must meet two related conditions. First, the republication or broadcast must be fair. This means that the account must not employ selective omission and inclusion in such a way as to lose all reasonable balance or otherwise evidence a malicious, vengeful motive. As a second condition, the selected quotes and paraphrases must be accurate. If the defamatory report is a distortion of what was said in the proceedings, the privilege may be destroyed. As an Illinois court phrased it, the republication may not carry a greater sting than what was actually said in the official proceeding or documents.<sup>63</sup> If the republication meets these qualifications, the privilege applies—regardless of whether the plaintiff is a public figure or private figure.



### ***Types of Proceedings Covered***

The precise scope of the fair report privilege varies significantly from state to state. Generally, though, the privilege applies both to the content of live proceedings and to documentary information, so long as the proceedings or documents are open to the public and only if they indeed represent official public business. For example, the privilege typically will apply to accounts of the following: lawyers' and witnesses' statements in open court, legislators' comments during floor sessions or open committee hearings, official reports and studies by executive branch agencies, and information in police agencies' official arrest records.

On the other hand, pieced-together accounts of what transpired in a closed court proceeding or a report on the contents of a nonpublic police investigative record may not be privileged. (Chapters 6 and 7 examine the kinds of proceedings and records that the states deem public.) Also, reports on the unofficial statements or materials volunteered to you on the side by lawyers, police officers, and witnesses may not be privileged.

This point is illustrated by a 1998 federal District Court ruling. A Minnesota man was killed by a shotgun blast to the head while sleeping in his home. A sheriff's department investigation focused on the victim's wife as the prime suspect, but after five months investigators still had insufficient evidence to arrest the wife. During the end of this period, a CBS television station approached the lead sheriff's investigator, seeking an update on the investigation. After consulting with his superiors, the investigator described to the station a calculated killing and indicated the wife was the likely culprit. These statements were broadcast, and the victim's wife then sued CBS for defamation. Would the fair report privilege protect CBS? The TV station "did much more than reiterate or summarize official documents or proceedings," the court said, by broadcasting statements "nowhere to be found in any public record."<sup>64</sup> Consequently, the fair report privilege did not apply.

Would the result be different if the sheriff investigator's statements had been distributed to media via a news release? Not necessarily. Though the release is a more formal statement, it may still depend on whether the release was based on official government documents or proceedings. In one case, a federal District Court in Pennsylvania extended the state's fair report privilege to protect a newspaper's story based on a *foreign* government news release. One person identified in the release and the story as "associated with planning illegal activities in Israel" sued the newspaper for libel. But the court found that the release summarized official Israeli government action of public concern and that the paper was therefore privileged to report fairly on the contents of the release. However, the court cautioned that not all statements issued by a foreign government agency would, if repeated, give rise to the fair report privilege.<sup>65</sup>

Some states have extended the media privilege even to accounts of nongovernmental public proceedings on matters of public concern, such as speeches made during political campaigns. And the *Second Restatement of Torts*

suggests that the privilege should apply to reports of “any meeting, assembly, or gathering that is open to the general public and is held for the purpose of discussing or otherwise dealing with matters of public concern.”<sup>66</sup> You should check the statutes and case law to see how liberally your state applies this very important privilege.

## NEUTRAL REPORTING

The fair report privilege, with origins in both case law and state statutes, is well established throughout the country. By contrast, a constitutionally based privilege known as **neutral reportage** has floundered at the doorstep, hoping to gain full-scale acceptance by the courts. It is of potentially great importance. The neutral reporting privilege essentially picks up where the fair reporting privilege leaves off. It would shield the media from libel judgments when reporting in a fair, neutral, and accurate fashion the newsworthy allegations made by others about public officials or public figures—without the requirement of an official or public setting.

The neutral reporting privilege was born in 1977 in the federal appellate court case of *Edwards v. National Audubon Society, Inc.* The case arose when Audubon Society officials labeled as paid liars certain scientists who denied links between pesticide use and harm to wildlife. The *New York Times* reported the charges and was sued for libel, but the U.S. Court of Appeals ruled that under these circumstances the *Times* could not be punished. Wrote the court:

When a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter’s private views regarding their validity. . . . What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth.<sup>67</sup>

Other courts and legal scholars expressed grave concerns, however, that such a privilege would be too broad an exception to the rule in libel law against repeating unverified accusations. In the 1980s and 1990s the privilege languished, with some courts declining to recognize the privilege and others adopting it, but with ill-defined and differing contours. For example, the Eighth Circuit adopted the privilege, while the Third Circuit expressly declined to follow it. And in 1989, the U.S. District Court for the District of Columbia applied an expansive version of the privilege, one that covers “all republications of serious charges by one participant in an existing public controversy against another participant in that controversy, regardless of the trustworthiness of the original defamer.”<sup>68</sup> The case involved comments made by a Hawaiian environmental activist, who vanished

soon thereafter, that a member of the state land board was “the Godfather of Hawaii’s underworld.” The charge was carried by the United Press International wire service.

But neutral reportage was dealt a serious setback in 2004 and 2005 when the Pennsylvania Supreme Court ruled that no such privilege existed and the U.S. Supreme Court later declined to review the case. The case of *Norton v. Glenn*<sup>69</sup> began when the Chester County *Daily Local* ran a story headlined “Slurs, insults drag town into controversy.” It detailed heated exchanges between members of the Parkersburg Borough Council—including exchanges that occurred outside the council chambers. According to the story, one member of the council said two of his colleagues were homosexuals and also issued a statement implying they were child molesters. The targets of these accusations sued the councilman for defamation and also sued the newspaper.

The trial court ruled that the newspaper was entitled to a neutral reportage privilege as a logical, constitutionally based extension of the fair report privilege and that it protected the paper whether or not it suspected the reported comments were false. These were serious charges by a public official against other public officials involved in an ongoing controversy, the court noted. But the Pennsylvania Supreme Court analyzed a number of U.S. Supreme Court cases and concluded that the Court never implied that such a privilege was mandated by the First Amendment. Pennsylvania’s high court said that in these kinds of defamation cases “considerable protection” is afforded to defendants by the actual malice standard. Beyond that, the court held, no blanket immunity is a necessary or logical outgrowth of either the U.S. Constitution or the Pennsylvania Constitution.

## THE WIRE SERVICE DEFENSE

A number of courts have recognized a so-called wire service defense. It is available when a media organization republishes material from a reputable news service without substantial change and without suspecting the content to be false.

For example, in one case a newspaper in Alaska published an Associated Press wire service story in its entirety, exactly as transmitted by AP. All the paper added was its own headline: “Alaska Bush Pilot Accused in Arizona Drug Trafficking.” The paper made no attempt to verify or investigate independently. But neither did anyone at the paper have reason to doubt the accuracy of the report. A federal court promptly dismissed a resulting libel claim against the newspaper.<sup>70</sup>

In essence, this defense is little more than a formalized application of the basic fault standards covered earlier. Unless something on the face of the wire service release would put the local media organization on notice that the release may be inaccurate, or unless the local medium knows the story to be inaccurate, it is not an act of negligence to run the story from a reputable news agency without further verification. A similar rule generally applies to advertisements submitted

to a medium by a reputable advertiser or agency. Note, however, that this defense might not apply when the local medium fails even to read the submitted material prior to publication.

## RETRACTIONS

About thirty states have enacted **retraction statutes** that provide the media with varying degrees of protection from libel lawsuits. In all cases these laws are an effort to encourage the resolution of libel disputes outside of court. Typically, this is done by limiting a potential plaintiff's recoverable damages if the media publish a timely correction or retraction. Unlike the privileges mentioned earlier, retraction statutes are only a partial shield against libel claims. A lawsuit may still be filed after a retraction is published, but the amount of the plaintiff's potential recovery is restricted to some degree.

California's retraction statute will serve to illustrate. It reads that in any defamation lawsuit against a newspaper or broadcast station, the plaintiff may recover no more than special damages unless a formal retraction had been demanded and had not been published or broadcast.<sup>71</sup> Special damages are only those provable losses of a monetary nature, such as loss of income in a business or profession. These business losses are generally much smaller and harder to prove than the actual damages normally recoverable under the *Gertz* decision, and a valid retraction eliminates the threat of punitive damages. In other words, the statute encourages potential plaintiffs to first give the media a chance to set the record straight and encourages the media to run a correction if there was indeed an error. Under the statute, a libel lawsuit becomes much less attractive to the plaintiff if the media were not notified of the error promptly or if the media disseminated a legally sufficient correction.

Some states' retraction statutes are of less benefit to the media. For example, they may preclude punitive damages if the plaintiff failed to make a retraction demand or if an appropriate retraction is published, but the full scope of actual damages is still recoverable. Or a statute might not include the requirement that plaintiffs first make formal retraction demands before filing their lawsuits. But in a half-dozen states, the requirement on the plaintiff is even greater than in the California example. Under these statutes a potential libel *must* first make a timely retraction demand as a condition of the right to sue for defamation. Another important variable among the retraction statutes is the range of defendants covered. For example, some statutes apply only to alleged libel by the print media; the California statute cited earlier applies to newspapers and broadcast stations, but not to magazines.

Whether or not a statute applies, demands for a retraction should always be taken seriously by mass communicators. You should not be bullied or frightened into backing down when you are convinced you were accurate, for this would



### ***Have You a Defense or a Privilege?***

- Was the disparaging content part of a fair and accurate report of a public proceeding?
- Was the disparaging content republished from the dispatch of a reputable news service?
- Does the communication qualify as “fair comment” opinion on a matter of public concern, based on true facts and representing the sincere evaluation of the speaker?

sacrifice professional integrity. On the other hand, responding to complaints with sincerity and tact is an important way to ward off libel lawsuits. Responding with rudeness and disdain is a good way to provoke legal trouble. And if you have indeed been inaccurate on a matter of any significance, it is of course a matter of professional ethics that you set the record straight. (See Exhibit 4.4 for additional insights on provoking libel lawsuits.)

## **SUMMARY JUDGMENT**

Media defendants have been able to end many libel lawsuits prior to trial by obtaining summary judgment (described in Chapter 1). It is essentially a

### **EXHIBIT 4.4 Five Sure Ways to Tempt Fate**

1. Write memos to your editor or news producer about the “holes” in a story. Make plenty of copies and pass them out to everyone. Keep the original memo; it will give the libel plaintiff’s lawyer a road map to your company’s bank vault.
2. Disregard pleas that it would be premature to publish or broadcast a sensitive story. Railroad the story through.
3. Don’t waste a lot of time verifying routine police blotter or court stories. Even though they account for the single greatest percentage of libel claims, these humdrum stories are tiresome to check.
4. Hype a lead or headline, or if you’re in broadcasting inflate a “promo,” “teaser,” “toss,” “bumper,” or other device used to promote or maintain audience interest during commercial breaks. Jurors always understand economic incentive, and they quickly grasp why reporters have to publish or air interest-grabbing stories.
5. Harbor some personal animus toward your news subject. Better yet, tell someone how you can’t wait to get that “sleazebag.” Even better, put it in writing, in scatological detail.

*From “Some Lessons in Libel,” by media defense attorney Bruce Sanford. Washington Journalism Review, March 1986, p. 29. Reprinted by permission.*

determination by a judge that the lawsuit could have only one outcome and therefore there is no need to proceed with trial. The judge simply applies the law to the known facts and makes a ruling.

Summary judgment has been obtained by media defendants most often in cases filed by public figures and public officials when the plaintiffs could collect no evidence to support a finding of actual malice. Jurisdictions differ in their attitudes toward summary judgment, however. Some court systems encourage it as a way to avoid the chilling effect that prolonged and costly litigation may have on First Amendment rights. Other jurisdictions are less inclined to grant requests for summary judgment, believing that plaintiffs have a right to their day in court unless the lawsuit is clearly a groundless attempt to harass the media.

According to the U.S. Supreme Court, however, summary judgment must be granted in public person cases unless the plaintiff has “clear and convincing” evidence that raises a “genuine issue” of whether actual malice exists. The Court addressed summary judgment at length in 1986 in *Anderson v. Liberty Lobby, Inc.*<sup>72</sup>

## COUNTERATTACKS BY THE MEDIA

In the mid-1980s, during a time of increased libel lawsuits against the media, communicators in several instances began fighting back, not only by seeking early summary judgment but also by suing the libel plaintiffs in turn. The countersuits are most frequently based on claims of malicious prosecution and abuse of process.

The tort of **malicious prosecution** is the initiation of an unsuccessful lawsuit that the plaintiff never reasonably believed could be successful and that caused the defendant significant expense or damage to reputation. For example, if an individual filed a groundless libel claim against a TV station, perhaps in a quest to force a settlement, the station might countersue for malicious prosecution. **Abuse of process**, a related tort, is the improper use of any legal procedure—that is, the use of legal procedure for some ulterior purpose. A libel plaintiff could commit this tort by, for example, filing a civil complaint to intimidate a newspaper and delay publication of information about the plaintiff.

## ANTI-SLAPP STATUTES

In 1988 the acronym SLAPP (strategic lawsuits against public participation) was coined by two University of Denver professors to describe lawsuits without merit that are filed to dissuade or punish the exercise of First Amendment rights by others. In the typical kind of case studied by law professor George W. Pring and sociology professor Penelope Canan, a libel lawsuit is filed by a business against an ordinary citizen who, on public interest grounds, has opposed the business in a government proceeding. For example, a shopping center developer sues a local resident who publicly opposes zoning approval for the developer’s construction project in an effort to intimidate and silence the citizen.

Operating under the perception that these so-called SLAPP cases were on the rise, several states in the 1990s enacted **anti-SLAPP statutes** that create a streamlined procedural avenue for libel defendants to get such lawsuits tossed out of court. Under the typical anti-SLAPP law, courts must promptly dismiss libel cases concerning statements on public issues unless the plaintiff can demonstrate a probability that the lawsuit has legal merit and is not merely an effort to intimidate.

The scope of these statutes varies considerably from state to state. But as of 2009 at least 26 states had passed some form of anti-SLAPP law, bills were being considered in another handful of states, and a public-interest law firm had created the Federal Anti-SLAPP Project seeking to build a coalition to push uniform, national SLAPP protection.

In some states these statutes are drawn broadly enough to also protect the mass media when they are sued for libel concerning statements about a public issue. In California, which possesses one of the most sweeping anti-SLAPP laws, an appellate court ruled that the *San Francisco Chronicle*—a large, corporate media defendant rather than the typical private-citizen SLAPP target—could seek to have a libel case dismissed under the anti-SLAPP law. The *Chronicle* had been sued by a private, alternative university following a series of published stories about a zoning dispute between the school and the county. The stories included some unflattering characterizations of the school and its leaders. The university sued for libel, and the *Chronicle* filed a special motion to dismiss the lawsuit under the anti-SLAPP law, saying that because the stories were true, the university could not demonstrate a probability that it would prevail.<sup>73</sup>

### **Libel Insurance**

An adverse verdict in a single libel lawsuit could force some media organizations out of business. Therefore, many mass communication businesses carry libel insurance. However, libel insurance does not eliminate all risk. For one thing, only a handful of companies write libel insurance in the United States, and communication businesses deemed high risk sometimes find they cannot obtain the insurance. Also, even where insurance can be obtained, some smaller businesses have decided that it is just too costly.

Another limitation on libel insurance is that most insurers' policies do not cover punitive damages. In fact, most states do not allow insurance companies within their borders to protect against punitive damages, the theory being that the public interest is not served by covering malicious behavior.

In the case of broadcasters and newspapers, leading trade organizations have arranged to provide libel insurance coverage for their members through private insurance carriers. The cost of the insurance depends mainly on the amount of coverage desired, the circulation or viewership of the paper or station, and the business's history as a libel risk.

## STATUTES OF LIMITATIONS

Regardless of the merit of a defamation claim, a plaintiff must file the lawsuit within a time period specified by law—or the claim is forever barred. The specified time period for filing lawsuits is called the **statute of limitations**; for defamation claims it ranges from six months to three years, depending on the state. In some states the period is shorter for slander claims than for libel. In the overwhelming majority of states, however, the applicable statute of limitations for all defamation claims is one or two years.

In most states the time period for filing a defamation claim begins running on the day of publication or broadcast, not the date when the plaintiff actually learned of the defamation, which could be much later. For publications that distribute nationally, the statute of limitations does not serve as a solid protection against a lawsuit until it has expired in the states with the longest filing periods—three years.

## DEFAMATION IN CYBERSPACE

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The Internet, with its informality, its interactive sites, its instant message postings, and its often anonymous users, is the perfect environment for defamation. And in fact, there is today a proliferation of Internet defamation claims, or “cyber-libel.” Much of the trouble arises from user-generated content, including “citizen journalism.” Internet libel claims have generated considerable legal hassle and debate over the details of jurisdiction and over the question of who should be in the chain of liability.

Internet defamation cases generally fall into two categories: (1) lawsuits against the originators or primary publishers of libelous content, such as e-mail authors and the creators of website content, and (2) lawsuits against the Internet service providers (ISPs) or system operators. Cases of the first kind have been fairly straightforward, following the general rules of defamation discussed in this chapter. But cases of the second type have generated some Internet-specific law. The challenge in ISP cases has been how to apply traditional chain-of-liability notions to a unique medium.

The traditional model of tort liability for communicators is keyed to the degree of editorial control that the defendant assumed and exercised, or should have exercised, over the content of expression. The model is as follows:

**Publishers.** The creators, editors, and packagers of disseminated information have assumed control over the product and therefore are held to the greatest degree of accountability for content. Examples are newspapers and television stations. They are in the chain of tort liability even for material that they do not originate, such as letters to the editor. (Some legal



exceptions exist for material the publisher could not reasonably be expected to verify, such as the wire service privilege discussed earlier.)

**Distributors.** Those who were not involved in content but who actively disseminated it have not been held liable for the content unless they actually knew of its harmful character. Distributors include libraries, bookstores, and newsstands.<sup>74</sup>

**Common Carriers and Conduits.** Those who provide channels for communication but who are not reasonably in a position to monitor and restrain content have virtually no legal responsibility, even if they do become aware of the offensive communication. Common carriers include telephone companies and private mail carriers.

Internet service providers do not always fit neatly into this model for liability. ISPs such as electronic bulletin board operators may possess some attributes of publishers, some attributes of distributors, and some attributes of a simple conduit. Further complicating the matter is the great variation in screening and editing practices among these providers.

## ISP LIABILITY

Two often-cited libel cases from the early 1990s addressed the issue of ISP liability for material posted by electronic bulletin board users. In each case the court referenced the model above to determine whether the ISP justly should face liability. The cases reached different conclusions, however.

### *Traditional Analysis*

In *Cubby v. CompuServe Inc.*,<sup>75</sup> CompuServe was sued for allegedly libelous statements made by a third party and disseminated in the service's "Journalism Forum." The statements became available to users immediately upon being uploaded into the system by the user, and CompuServe did not monitor the posting. CompuServe sought summary judgment on the grounds that it was an electronic distributor, not a publisher; that it did not know of the libelous character of the statements; and that it therefore could not be held liable. The federal District Court in New York agreed, citing both the common law and First Amendment considerations, and granted summary judgment in favor of CompuServe.

In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,<sup>76</sup> an investment banking firm sued the Prodigy ISP for defamatory statements posted by an unknown user on the Prodigy bulletin board "Money Talk." But in this case a New York state court declined to categorize Prodigy as a distributor. Rather, it concluded that Prodigy was a publisher because the company advertised to the public that it controlled the content of its bulletin boards and because it did in fact exercise some control, both through a software program that screened out certain offensive words and through board leaders—people contracted to enforce Prodigy's content guidelines

against material in bad taste. Even though Prodigy's control over content was far from complete and was often exercised long after the material became available to users, the state court concluded that Prodigy had assumed the role of publisher and could therefore be held liable.

The upshot of *Prodigy* was that it penalized the ISP for exercising some editorial control and attempting to clean up the content of its bulletin boards. Apparently the ISP would have been better off, legally speaking, to exercise altogether no control and allow bad-taste submissions to clutter its site. This result jolted the online community and sparked an outcry that convinced Congress to insert a "Good Samaritan" provision into the Communications Decency Act (CDA) of 1996.

### ***Statutory Immunity***

Many Internet services receive so many uploaded messages so rapidly that it is virtually impossible to fully screen and edit the material as it arrives. On the other hand, the fact that the information comes from many unknown and untrained sources makes it a virtual necessity that some minimal monitoring take place to protect the decency and commercial attractiveness of the service.

To encourage such screening, Congress placed in the CDA a provision that reads: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The intent of this provision, section 230 of the Act, is to encourage Good Samaritan blocking and screening of "offensive material."<sup>77</sup>

One of the first cases to interpret and apply this statutory provision was *Zeran v. America Online, Inc.* Following the catastrophic Oklahoma City bombing of 1995, someone posted to AOL's electronic bulletin boards several bogus messages claiming to be ads for "Naughty Oklahoma" T-shirts. The messages contained offensive slogans disparaging the bombing victims, and attached was the name "Ken Z" and a Seattle phone number that belonged to Zeran. He received many abusive phone calls from people offended by the messages. Zeran then notified AOL that the ads were a hoax and demanded their deletion. AOL did delete the messages and terminated the sender's account, but it was unable to determine the true identity of the hoaxer, who soon set up new accounts and reposted versions of the offensive messages. Zeran sued AOL, claiming that it was negligent in failing to remove the defamatory messages immediately. The federal District Court granted summary judgment for AOL, holding that it was immunized by section 230. In 1998, the Fourth Circuit Court of Appeals boldly affirmed. Wrote the court:

By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third party user of the service. Specifically, § 230 precludes courts from entertaining

claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred. . . . None of this means, of course, that the original party who posts defamatory messages would escape accountability.<sup>78</sup>

The broad interpretation of section 230—as a virtually absolute immunity for ISPs—has been followed by an overwhelming majority of courts since *Zeran*. But was that truly the intent of Congress? Should an ISP have blanket immunity even in cases where it disseminated material that it did actually review and should have recognized as libelous? A few courts and legal scholars have questioned this immunity interpretation, suggesting that perhaps section 230 meant only to codify for ISPs the common law principle of distributor liability, as it existed before *Stratton Oakmont*—that is, no liability unless the distributor actually knew of the defamatory nature of the message.<sup>79</sup> Nevertheless, as Internet services in recent years have increasingly become focused on user-generated blogs, comments and chat, section 230 immunity has played a major role in U.S. libel law.

Here is a typical case from 2009: The defendant, Xcentric Ventures, operated a website called “The Rip-Off Report.” Content for the site was provided by users who posted their negative impressions of various businesses. But Xcentric did employ people as content monitors to review user reports and remove items that were offensive or too personal, and the monitors had occasionally written headings for the user reports. The plaintiff, a business consulting firm that found itself mentioned on the site in unkind terms, sued Xcentric for libel. Plaintiff argued that section 230 immunity should not protect Xcentric because the defendant was actively engaged in shaping the content. But the federal district court held there was no evidence that Xcentric substantially altered any of the postings at issue and that the defendant was therefore immune under section 230. Summary judgment therefore was granted in defendant's favor.<sup>80</sup>

It is very important to remember, however, that section 230 immunity is limited by the statute's own terms to providers of interactive computer services. If the Internet company is in truth a provider of *content*, then it is responsible for that content and statutory immunity does not apply. In the Internet medium this distinction is not always clear. One of the leading cases is *Fair Housing Council v. Roommates.com*. The Roommates website was designed to match people renting rooms with people looking for rooms to rent. Users of the site had to create profiles by answering certain questions on the site. Some of the questions were relatively personal, including sexual orientation and whether children would be brought to the household—information that was alleged to violate the Fair Housing Act and state anti-discrimination laws. The Ninth Circuit Court of Appeals held that Roommates.com was beyond the scope of section 230 immunity. Even though users were providing the content, the site's own mandatory questions strongly

shaped that content. Roommates was therefore much more than a passive distributor of user-generated content, so the site was operating outside the scope of immunity.<sup>81</sup>

## USER LIABILITY

Most of the published cases concerning cyberspace defamation are cases against the actual originators of libelous content—the users who upload libelous messages to electronic bulletin boards and newsgroups or who write and distribute defamatory e-mails. These cases have been fairly predictable, in that the creators of a defamatory communication are always in the chain of potential liability, regardless of medium. An interesting issue, however, is whether publication via bulletin board services activates the provisions of state retraction statutes.

Illustrating this issue is the 1995 case of *It's in the Cards, Inc. v. Fuschetto*,<sup>82</sup> a case between a sports memorabilia dealer in Wisconsin and another dealer in New York. The two men had communicated frequently by phone and e-mail and, in the course of these communications, had arranged to visit each other in New York. One of the dealers became ill, however, and suggested the meeting be postponed. This led to a series of e-mail communications in which the men argued over the cost of tickets that had already been purchased for the airline travel, for a Knicks game, and for *The David Letterman Show*. Consequently, the New York dealer posted allegedly defamatory remarks about the other dealer on SportsNet, a computer bulletin board service.

The Wisconsin dealer sued the New York dealer for defamation, but the defendant argued that the plaintiff failed to issue a written correction demand as required under the Wisconsin retraction statute. That statute specifies that, before a lawsuit can be filed “on account of any libelous publication in any newspaper, magazine, or periodical,” the persons responsible for the communication must first be notified of the error, in writing, and given a chance to correct it. The trial court granted the defendant’s motion for summary judgment on the grounds that the bulletin board note was part of an electronic “periodical” under the statute, thus requiring a prior demand for retraction. But the Wisconsin Court of Appeals reversed and remanded the case for trial. Posting messages to the SportsNet bulletin board amounted to random, computerized communication, not a publication that appears at regular intervals, and therefore was not a *periodical* under the usual meaning of that term, the court ruled.

### **Anonymous Postings**

Another problem in the world of cyber-libel is that defendants are often anonymous. Do plaintiffs have a legal right to learn the identities of those who posted allegedly defamatory comments? The first high court to rule on this question was the Supreme Court of Delaware in the 2005 case of *Doe v. Cahill*.<sup>83</sup>

Using the alias “Proud Citizen,” an Internet blog user posted comments critical of a local city councilman, Cahill. In reference to Cahill’s public performance, the postings used such terms as “divisive impediment,” “mental deterioration,” and “paranoid.” Cahill initiated a libel claim and then obtained a court order requiring Internet service provider Comcast to disclose the true identity of the defendant who posted the comments. The lower court issued the disclosure order because, it said, Cahill had made a “good faith” case that he was a victim of defamation. But Delaware’s Supreme Court held that anonymous Internet speech was like anonymous political pamphleteering, a traditional method of advocacy and dissent highly protected by the First Amendment. Therefore, a tougher standard applies. A court cannot order that an anonymous blogger be unmasked unless the plaintiff shows an actual likelihood of prevailing at trial. In this case, because the blog comments would likely be understood as mere opinion, the court said, the standard could not be met; Proud Citizen would remain anonymous.

Many other issues remain to be clarified in the world of cyber-libel. Among them: Just what kind of Internet sites do come under the domain of state retraction statutes? What does it take for someone to become a “public figure” in cyberspace? On the Internet, which communication is “a matter of public concern” and which is purely private communication?

## **LIBEL TOURISM**

The Internet has had the effect of broadening jurisdiction and potentially subjecting libel defendants to court proceedings in foreign countries. Even if the offending material is published in book form and distributed only regionally within the United States, it’s likely the book will soon be made available on the Internet, where it easily can be purchased, viewed, or downloaded in countries around the globe. Even limited, unintended distribution in a foreign country may be enough for that country to claim jurisdiction. Not only can this create a huge expense and inconvenience for defendants, but libel law in other countries is typically less friendly to defendants, without the First Amendment protections built into U.S. libel law. Some nations recognize special kinds of civil or criminal libel that would not be recognized in the United States. For example, Canada has laws prohibiting expression of racial hatred, and Germany makes it illegal to desecrate the memory of victims of the Nazis.

Some libel plaintiffs and their lawyers specifically file their libel cases in plaintiff-friendly countries, such as the United Kingdom. This practice has come to be known as “libel tourism.”

As noted in Chapter 1, American courts may refuse to enforce foreign judgments against U.S. citizens if those judgments are deemed contrary to First Amendment principles or other provisions of the U.S. Constitution. Congress has considered additional statutory protection to discourage libel tourism. In 2009

Pennsylvania Sen. Arlen Specter introduced the Free Speech Protection Act (S.449). As introduced, the bill provided that when a U.S. citizen is sued for libel in a foreign court—concerning speech that occurred in the United States and would not constitute libel here—that person may in turn file a federal court action to block enforcement of any foreign judgment and to obtain damages, including any legal fees associated with the foreign lawsuit.

## **LIBEL REFORM EFFORTS**

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The libel rules presented in this chapter are the result of extensive evolution and balancing by the courts, over decades. Still, many of the nation's authorities on libel law criticize the way the system works in practice, with its labyrinth of Constitution-based rules. Some classic, high-profile cases have come to symbolize the tortuous curves and hurdles of modern defamation lawsuits.

### **REASONS FOR CHANGE**

In 1976 actress Carol Burnett sued the *National Enquirer* for \$10 million. The supermarket tabloid had erroneously reported that Burnett had become boisterous, argued with the secretary of state, and otherwise made a spectacle of herself at a Washington, D.C. restaurant. The *Enquirer* ran a retraction, but it was ruled of no legal value under the California retraction statute because the *Enquirer* was not a “newspaper.” In 1981 a jury awarded Burnett \$1.6 million, most of it in punitive damages. The trial judge reduced the award to \$800,000, and in 1983 an appellate court further reduced the award to \$200,000. The court gave Burnett the option of a new trial on the issue of damages, however, and she chose that option.<sup>84</sup> The lawsuit finally ended in 1984 with a settlement of undisclosed terms, after eight years and the accumulation of millions in attorneys' fees.

Burnett's attorney, Barry Langberg, in a 1990 telephone conversation with the author of this book, said that Burnett “had the time, the money, and the inclination” to pursue her case to the end. But when injured plaintiffs are without substantial resources, he said, “then it's very hard to see the justice in the system.”

The case of *Newton v. Newton v. National Broadcasting Co.* (discussed *supra*) was first initiated by Wayne Newton in 1981. A trial took place five years later, and in 1986 a federal jury awarded Newton more than \$19 million in compensatory and punitive damages. The trial judge then sliced the total award to \$5 million. Both parties appealed. Finally in late 1990—almost ten years later—the Court of Appeals threw out the libel award altogether, ruling there was insufficient evidence of actual malice.

Indeed, many other libel cases have had similar, tortured procedural histories. From all parties' viewpoints, the flaws in the system are apparent. First, even

though media defendants ultimately win most libel lawsuits, the legal costs of the defense can be enormous. Perhaps the specific libel rules have reached a reasonable balance between freedom of speech and the need to safeguard reputations. But now it may be the prospect of a lengthy and expensive lawsuit that works a chilling effect on speech, encouraging the media to steer clear of controversial stories.

Second, the process can be prohibitively expensive and wearisome for plaintiffs, too. This means that people who were truly harmed by erroneous information in the media may conclude they have no practical legal avenue to obtain vindication. And even if a substantial sum is awarded at trial, by the time appeals are completed, the award may do little more than cover the legal expenses.

Finally, from the public's standpoint the process of a libel lawsuit, with its complicated turns and lengthy delays, rarely supplies satisfactory answers on the question of truth or falsity or on the virtue of the communicator's performance. Depending on the case, these matters of public concern may not even be the focus of the lawyers' efforts. These criticisms may be overstated to some extent, but a movement has indeed been building—in Congress, state legislatures, and legal and media policy organizations—for some kind of reform.

## THE UNIFORM CORRECTION ACT

The most ambitious libel reform effort to date was undertaken by the National Conference of Commissioners on Uniform State Laws, a prestigious organization of legal experts that drafts model legislation for possible adoption by the states. The commissioners address legal matters where consistency among the states would be particularly advantageous. In 1993, after several years of work, the commissioners approved the Uniform Correction or Clarification of Defamation Act (UCCDA).

In early drafts, the commissioners attempted a thorough overhaul of defamation law. But these drafts met considerable resistance from the media. In its final form, the UCCDA became a narrower proposal that appeared to have good prospects of adoption by the states. The act is basically a retraction statute similar to those already existing in some jurisdictions; it seeks to encourage timely corrections of defamation and to provide a means of settling disputes without going to court. But the UCCDA is substantially broader and more detailed than most preexisting state retraction statutes.

The UCCDA applies in all defamation situations, regardless of whether the potential plaintiff is a public or private person, or whether the would-be defendant is a mass medium or an individual. The act requires that, in all such cases, the aggrieved party formally request a correction within ninety days from first learning of the defamatory communication. If a ninety-day request is not made, the aggrieved party may still sue but is limited to recovery of provable economic

loss; punitive damages and damages for general injury to reputation would be precluded. Furthermore, even if a plaintiff makes a timely correction request, the defendant can still limit the plaintiff to recovery of economic loss by publishing a “timely and sufficient” correction.

The American Bar Association endorsed the UCCDA in 1994, and shortly thereafter state legislatures began considering the model bill. In 1995 North Dakota enacted the proposal into law, and it appeared that other states would follow. The American Society of Newspaper Editors backed the UCCDA, and many legal experts believed it is a realistic, rational proposal for resolving disputes and reducing the chilling effect posed by lengthy lawsuits and huge damage awards. In addition, it would give national media, for the first time, a uniform set of legal rules governing corrections.

Yet the effort stalled, leaving North Dakota as the only state to have adopted the model legislation. One reason, perhaps, is that many media opposed the UCCDA, fearing that it might spawn a huge volume of “truth suits.” And perhaps, despite its burdensome characteristics, the current law has struck a balance that most vested parties can live with.

## Summary Points

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**The law of defamation** can be traced back hundreds of years; it is based on the common law right of people to protect their good reputations against attack.

**Defamation law encompasses** the twin torts of libel (written defamation) and slander (spoken defamation), but the legal rules for these torts are nearly identical today. Some states also have criminal laws against defamation, but criminal prosecutions are rare and constitutionally suspect.

**Beginning with the 1964 landmark case** of *New York Times v. Sullivan*, the Supreme Court has forced remodeling of the states’ defamation rules so that mass communicators would have adequate breathing space to pursue First Amendment ideals.

**To win a libel lawsuit** against a mass medium, a plaintiff today must prove in court all of the following:

- Defamatory message (one tending to injure reputation)
- Falsity of the message
- Publication to third persons
- Identification of the plaintiff
- Fault on the part of the communicator (actual malice or at least negligence)
- Injury to the plaintiff as a result of the defamation



**To establish actual malice**, public person plaintiffs must prove through direct or circumstantial evidence that the defendant published with knowledge of falsity or with serious doubts about the accuracy of the material.

**In addition to the libel elements**, communicators have several privileges and other protections. Perhaps most important, communicators cannot be liable for simply relaying, accurately, the contents of public proceedings and documents.

**Also, broadcasting or publishing a retraction** has, in many states, the statutory effect of limiting the extent of potential liability.

**In the chapter Hypothetical** about the sheriff, some of the comments made in the newspaper ad would be protected as pure opinion. Others, such as the charges that the sheriff is “looking the other way,” may be “taking bribes,” and may “soon be indicted,” suggest statements that could be proved true or false and therefore could support a libel claim. If so, an important question becomes whether the newspaper and you, as advertising manager, were at fault in allowing the ad to run. The sheriff, as a public official, would have to prove actual malice—but some evidence of actual malice exists in the fact that reporters specifically told you, in advance, that they thought one of the serious allegations was false.

## Discussion Questions

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1. In recent decades the courts have gone to considerable effort to achieve the proper balance between the right of free speech and the right of defamed people to seek compensation for their injured reputations. In your opinion, considering the many legal rules discussed in this chapter, has the proper balance been reached? If so, has the legal framework become too cumbersome to do justice, as some charge? Do any reasonable alternatives exist, other than the kind of retraction-tempered lawsuit described at the end of this chapter?
2. Suppose, in the chapter Hypothetical, that the charges of bribery against the sheriff had been typed in a flyer and distributed all over town by the citizens' group. The flyers are causing quite a stir, and you, as a news reporter, would like to repeat in a news story exactly what the group is alleging. Could you legally do so, even if you suspected the allegations were false? In a jurisdiction that recognizes the neutral reportage privilege, what conditions would have to be satisfied before the privilege would protect you?
3. Suppose you were a speechwriter for the disparaged sheriff in the chapter Hypothetical, and the sheriff is giving a speech tomorrow in which he wants to go on the offensive against Sam Smith, a member of the opposition

citizens' group. Would any of the following comments be privileged or otherwise safe from a libel claim? "I think Smith must be a cocaine dealer." "I think Smith is the kind of man who would be a cocaine dealer." "Half the people in this town think Smith is the kind of man who would be a cocaine dealer." "Smith has the kind of weak moral values I often observe in cocaine dealers."

## Key Terms

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abuse of process	presumed damages
actual damages	product disparagement
actual malice	public figure
all-purpose public figure	public official
anti-SLAPP statutes	public record privilege
compensatory damages	publication
constitutional malice	punitive damages
defamation	retraction statutes
fair comment privilege	rhetorical hyperbole
fair report privilege	slander
libel	special damages
libel by implication	statute of limitations
limited-purpose public figure	strict liability
malicious prosecution	trade libel
neutral reportage	

# Invasion of Privacy



*After completing this chapter, you should*

- **Appreciate** the rationales behind laws that aim to protect personal privacy, rights of publicity, and peace of mind.
- **Know** the distinguishing elements of the four main privacy torts.
- **Understand** the role of related torts that may arise along with claims of privacy invasion.
- **Know** some of the typical criminal laws that aim to protect privacy and restrict media content.
- **Be** able to analyze a given set of facts to determine which media practices would violate privacy laws, which would be safe, and which would fall into the risky gray area, which can be quite substantial in privacy law.

## ORIGINS OF PRIVACY LAW

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Privacy law is among the most complicated and potentially far-reaching legal concerns facing mass communicators today. It is also a comparatively young and unsettled area of law. When this nation was formed, there was no privacy law to inherit from the common law of England. Nor did the U.S. Constitution

## Hypothetical

### The Spicy Private Life

Assume you are the producer for a TV news show, and you're preparing a special series titled "Who's Teaching Our Kids?" about the private lives of local high school teachers. You hear seamy rumors from several students about a biology teacher, Vera Grundy, and you decide to check it out. After digging through old police logs at the city records office, you discover that Grundy was arrested once, eight years ago, for drunk driving. Also, a former friend of Grundy's tells you that when they were in college the two women hid behind the dormitory two or three times to try cocaine and other drugs. They had kept this a closely guarded secret ever since. The ex-friend also tells you that Grundy recently made several visits to a psychiatrist's office for treatment of acute depression.

The ex-friend also tells you that Grundy maintains a secure website devoted to her favorite hobby, hot tub parties. The main feature of the site is a hot tub schedule for Grundy's home. She provides user names and passwords to a select list of friends who can then access the site and make party reservations online. You ask the ex-friend if you might use her name to access the site, and she agrees.

Based on what you learn from the restricted website, you decide to stake out Grundy's secluded backyard one night. Her suburban property is surrounded by a solid wooden fence and thick vegetation, but you and a camera operator climb into a tree nearby. From your perch you can see a portion of Grundy's backyard. Using a video camera equipped with a powerful lens, you get footage of Grundy naked in her hot tub with two male friends.

Your station decides this segment is worth promotion. Between a couple of late afternoon soap operas, one of the news anchors comes on the air and announces: "Vera Grundy, the hot tub teacher. Get the disturbing story on tonight's eleven o'clock news, right here on Channel Seven."

This scenario raises serious ethical concerns for you, of course, and perhaps some legal ones. From a strictly legal standpoint, would you be safe in broadcasting all of this information about Grundy? Some of it? Have you or your station already crossed the legal barrier, even if you never broadcast the details of what you learned? Would you answer differently if Grundy were running for a seat on the school board?

specifically recognize the right of individual privacy, and the early legislatures did not feel a need to address it.

But by 1900 times had changed radically. Perhaps most important was the advent of commercial mass media that were highly competitive and pervasive. Extremely private matters could be made public overnight—and the media seemed increasingly inclined to do just that. Today, with assaults on privacy coming not only from the mass media but also from other business enterprises, from

government, and from other individuals—and with the assaults coming in such new forms as computer databases, telemarketing, social networking sites, and sophisticated electronic taping and surveillance devices—the public seems increasingly concerned about protecting what’s often called a “right to be left alone.”

Legal scholars often trace the privacy laws of today to an influential 1890 article by law partners Louis Brandeis and Samuel Warren, published in the *Harvard Law Review*. The authors were reacting to the personal affronts of gossip-oriented newspapers in that era of yellow journalism when they proposed that the law recognize a right of privacy. They wrote:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. . . .

To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attending upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.<sup>1</sup>

States in the early 1900s began to recognize a civil-law right of privacy. Some states passed statutes; in others, the courts developed the right through common law. These early laws prohibited using without consent a person’s name or picture for advertising purposes. From this beginning the courts slowly expanded privacy law to cover the publication of truthful but embarrassing private facts—the kind of protection that Brandeis and Warren had proposed. Lawmakers in recent decades have added criminal statutes to punish privacy invasions in some circumstances.

Privacy-related lawsuits against the media have continued to escalate in the new millennium. The media successfully defend against most of these lawsuits. Yet there are enough plaintiff victories to rouse more plaintiffs, and enough instances of offensive media conduct to spark new legislation against such perceived abuses as hidden cameras and intrusive paparazzi-style tactics. Many of today’s privacy-invasion claims are aimed not at the traditional mass media, however, but at Internet-based services. In Chapter 4 we saw how user-generated content increases the risk of defamation on Internet sites. The same is true for invasions of privacy.

## FOUR DISTINCT TORTS

This chapter focuses on four distinct privacy torts that have evolved in most of the states, each tort with different rules and purposes. They are:

1. Commercial appropriation of name or likeness
2. Public disclosure of embarrassing private facts

3. Placing an individual in a false light
4. Intrusion upon physical seclusion

A slight majority of the states now recognize all four branches of invasion of privacy, either by statute or by common law. However, a significant number of states have not clearly adopted all of them. In some instances, states simply have not had reported appellate cases directly on point, making those states' positions uncertain. In a few instances, courts have specifically declined to recognize one or more of these privacy torts.

Privacy-invading circumstances often give rise to a combination of tort claims, including not only the privacy torts listed previously but also such claims as fraud, trespass, and intentional infliction of emotional distress. Although plaintiffs often make multiple tort claims, it is important for analysis purposes to avoid mentally commingling them. As you learn to distinguish the separate purposes and elements of the four privacy torts discussed in the following sections, you also will improve your ability to analyze potentially dangerous situations.

## APPROPRIATION OF NAME OR LIKENESS

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The first form of privacy invasion, **appropriation**, may be defined as the commercial use of a person's name or likeness without consent.

Here's the typical scenario: You take a photograph of an accomplished marathon runner as she crosses the finish line and provide the photo to a newspaper. The picture finds its way to the advertising department. The photo is then used prominently in an ad for a retail shoe store without the athlete's consent. The woman feels exploited by the self-serving actions of others—by the advertiser, the paper, and you—and she has potentially a good legal claim.

Appropriation is the best-established form of invasion of privacy, and it is of particular concern to photographers and to advertising and public relations practitioners. This civil wrong is also referred to as **misappropriation** or infringement of an individual's **right of publicity**. The theory behind this law is that individuals should have the sole right to control the marketing or exploitation of their own persona.

Some legal scholars view this as more of a business or property right than a privacy right. Indeed, lawsuits are often brought by people who are upset not about their appearance in an advertisement but about the lack of payment. Yet this law, like the other privacy torts, is also intended to compensate individuals for the infliction of embarrassment or shame—highly personal forms of injury—that can accompany unwanted publicity. Commercial appropriation lawsuits are often initiated by celebrities seeking to protect or control their commercially valuable images, but exploited private people may sue as well. As with libel, it is best to separate and examine the key elements of this tort.

## COMMERCIAL USE

**Commercial use** generally means exploitation directly for trade or self-enrichment purposes. Though the lines can be gray sometimes, modern courts have consistently made the critical distinction between commercial uses and noncommercial uses, such as news or public education. Further, the prevailing view is that this distinction is required by the First Amendment.

Advertisements or promotions for products or services are typical examples of messages with a commercial purpose, so the use of a person's image in those messages is usually deemed commercial. The clearest form of commercial use is the product endorsement ad, such as the shoe-store example. But product manuals, promotional contests, corporate recruiting films, and picture posters are other examples of productions that courts are likely to deem commercial.

At the other end of the scale, use of a name, photo, or sketch in the context of news is not deemed a commercial use. And an otherwise news-oriented context is not classified as commercial simply because the medium is operated for profit, as most mass media are. To be deemed a commercial use there must be some direct, self-serving link between the individual's identity and the promotion of a product, service, or organization. When the individual appears in news reports, the commercial element is insufficient, even if the individual's appearance might, in a less direct way, help sell newspapers. These are well-settled points, addressed by the *Restatement (Second) of the Law of Torts*:

The value of the plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities. . . . The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes a profit, is not enough to make the incidental publication a commercial use of the name or likeness.<sup>2</sup>

Unfortunately, the rule that news content cannot spark appropriate lawsuits has been clouded to a small degree by the U.S. Supreme Court's only decision in an appropriation case. It was an odd case, decided 5–4 by the Court. In 1972 Hugo Zacchini performed as the “human cannonball” at a county fair in Ohio. In each fifteen-second performance, he was shot from a cannon into a net two hundred feet away. One day a television news reporter videotaped the act, and it was shown on the eleven o'clock news. The human cannonball sued for damages, claiming that the TV station unlawfully appropriated his professional property and threatened the future economic value of his act. What was the result? Despite the usually solid rule that appropriation claims cannot arise from news content, the Supreme Court in this case held that no First Amendment privilege applies when a professional performer's entire act is broadcast without consent under the context of news. The state of Ohio was therefore free to allow tort liability if it wished. This opinion is much criticized and should be viewed as a narrow and rare exception to the usual principles of appropriation law.<sup>3</sup>

The general rule is that appearances in product advertising and promotions are usually commercial uses; appearances in news contexts are not. But this still leaves plenty of communications that are hard to categorize, such as corporate public relations publications that include legitimate news or educational information. Retail magazines and books can also be problematic.

### ***Magazines and Books***

In one case, *Playgirl* magazine contained an illustration, unrelated to any particular news or commentary, of a nude black man seated in the corner of a boxing ring. The man was recognizable as former heavyweight champion Muhammad Ali. He sued the magazine under New York's broad privacy statute, which stated that "any person whose name, portrait or picture is used within this state for . . . the purposes of trade" without the written consent of that person may sue for damages and an injunction. The court, ruling in favor of Ali, said that there was no informational or newsworthy dimension to the magazine's unauthorized use of Ali's likeness. Instead, the picture was a dramatization falling somewhere between representational art and cartoon, accompanied by a "plainly fictional . . . bit of doggerel."<sup>4</sup>

So magazine items that are purely fictional—solely for entertainment—may be deemed commercial uses in some states, even if the use is not directly connected with an advertising pitch. On the other hand, a news or educational article in a magazine should fall outside the scope of appropriation law, as should social commentary.

The covers of magazines or books frequently cause trouble. The general rule is that a cover picture is safe if it is derived from the newsworthy or educational content within. If the person depicted on the cover is not a subject of the content, however, the picture is deemed to be for a purely commercial, promotional purpose.

For example, when a magazine cover photo showed a man dressed in green at a St. Patrick's Day parade to illustrate an article about Irish immigrants, a court said the photo was related to the story and could not be the basis for an appropriation claim.<sup>5</sup> But in New York, a black teenager won an appropriation lawsuit against the publisher of a book about getting into college. The teen was not a subject of the book, but her picture, obtained from a freelance photographer, was used on the cover to help boost sales.<sup>6</sup>

In another *Playgirl* case, the cover photograph featured actor Jose Solano, Jr., best known for his role in the syndicated TV show *Baywatch*. Solano was shirtless and wearing his red lifeguard trunks, and the accompanying headline read: "TV Guys. Primetime's Sexy Young Stars Exposed." Inside, the magazine ran a mug shot of Solano and a quarter-page biography. Solano, offended by the cover's implication that he posed for nude photos inside, sued for both false light and appropriation. Though the magazine would normally be within its rights to run a cover photo related to editorial content within, the federal Court of



Appeals held in 2002 that this might be different. The usual privilege to depict people who are the subject of news coverage does not apply, the court said, if the plaintiff's likeness is used in a knowingly false manner to increase sales of the publication. The case was sent back to trial to make that determination.<sup>7</sup>

Sometimes the news-versus-commercial-use distinction is difficult, and courts from different jurisdictions may not be entirely consistent. Therefore, publications dealing with non-news content often play it safe by obtaining written consent. In the book cover case, the publisher was unaware that the freelancer had never obtained a signed photo release.

### ***The Internet***

The Internet has spawned new and easy ways to humiliate people—celebrities and private people alike—for profit. For purposes of a right-of-publicity claim, however, Internet sites blur the traditional lines between direct commercial uses and news.

An example is the case of Catherine Bosley, who was a TV news anchor in Youngstown, Ohio. While on vacation, she decided on the spur of the moment to enter a wet t-shirt contest at a small Florida nightclub. By the time the contest concluded, she had removed all her clothing. Some time later, photos began appearing on several websites, and video of the contest was included in a commercial DVD. Portions of the video showing Bosley's performance then also appeared on a subscription website, and the video was aggressively promoted.

Bosley sued the websites and the production company involved, alleging she was being exploited to further the defendants' commercial interests, without consent. She sought an injunction to prevent the defendants from further capitalizing on her images. What followed was a somewhat confusing back-and-forth between the federal district court and the court of appeals in 2004. The district court concluded that while the websites were free to comment on the incident or link to news accounts about Bosley and the t-shirt contest, exploiting her image as a product and as a promotion for similar content was not a legitimate public-affairs use. It also found that the damage to Bosley was serious enough to warrant a preliminary injunction against such exploitation by the defendants. The Sixth Circuit Court of Appeals saw things differently and stayed the injunction, pending a full appeal. Even if the website is a purely commercial operation, the court said, it was "not persuaded" that the content at issue was unprotected by the First Amendment.<sup>8</sup>

### ***Incidental Uses***

Categorizing the overall context of a message as commercial, as opposed to news or educational, helps determine whether individuals' appearances in those messages will be deemed commercial uses. But often the analysis must go deeper. For even if there is a commercial purpose behind a media message or production,

a depicted individual will have no appropriation claim if his identity is only incidental to the commercial message. Remember that what gives rise to this tort is the exploitation of some individual attributes—capitalization upon some values associated with the individual's name or likeness.

For example, suppose you took a long-range picture for that running-shoe ad—a photo of 150 runners crowded near the starting line. Technically speaking, each runner is identifiable. Yet these people cannot each bring an appropriation claim, because their identities are immaterial to the message. They are not appearing in the ad for any individual value, such as reputation, good looks, or even a particular pose. Nor would the circumstance imply a product endorsement by all these runners.

So it is the value of a person's name or likeness—some identifiable qualities—that must be appropriated for this tort, not the merely incidental appearance of the likeness. Communicators must be careful, though; rarely is a person's appearance in a commercial message purely incidental. When in doubt, it is wise to get consent or refrain from using the name or likeness in a commercial context. (The rules of consent are discussed *infra*.)

### ***Special Problem: News Promos***

A tricky area of commercial appropriation law is “house ads,” “teasers,” or other media self-promotions. In a case from Oregon, for example, a television news camera operator filmed an auto accident scene, including footage of a victim who was bleeding and receiving emergency medical care. The video did not appear on that night's news program, but it was used later—in a promotional spot for an upcoming special report on emergency care. The accident victim sued for appropriation, claiming his likeness was used without consent for the TV station's own commercial advantage. But the Supreme Court of Oregon ruled in favor of the station. Although the footage was used for a commercial purpose, the victim's appearance was merely incidental to that purpose, the court said. The promotion did not imply that the victim endorsed the forthcoming program about emergency care, and “the identity of the accident victim was immaterial,” the court said.<sup>9</sup>

But suppose newspaper editors use a photo of a movie star on page 20 of the newspaper and also reproduce it in a little box at the top of page 1. Along with the photo, the box reads: “A Film Star's Career Examined—See Page 20.” Now the individual's identity is the whole focus of the promotional message. Even here, the media are generally immune from appropriation claims because the name or likeness is being used to illustrate the legitimate contents of the paper, courts have said. This is essentially the sort of promotion that was described in the Hypothetical problem for this chapter.

The result will be different, though, if the promo implies an endorsement or any other commercial connection between the individual and the medium or if the promo doesn't match the coverage inside. For example, in *Cher v. Forum*

*International, Ltd.*, the federal court of appeals held a magazine liable for exploiting an interview with the entertainer Cher. She had given an interview to US magazine under the condition that she could bar publication if she did not like the results. Cher decided not to allow publication. However, the interviewer then sold the interview to *Forum*, a magazine of which Cher did not approve. In addition to publishing excerpts from the interview, the magazine used Cher's name on a pullout subscription card. The card claimed that Cher told *Forum* things she would not tell US magazine, and it read, "So join Cher and *Forum's* hundreds of thousands of other adventurous readers today." This was held to be a highly misleading and commercial use of the public figure's likeness.<sup>10</sup>

## NAME OR LIKENESS

Individuals must be readily identifiable in order to sue successfully for appropriation. This element is easy to recognize when it is a plaintiff's name or photograph that appears in the message. But the concept of **name or likeness** is broader than this. It could also be the plaintiff's nickname, voice, or any other mark of personal identity.

A classic case illustrates the point: A company had begun doing business under the name Here's Johnny Portable Toilets, Inc., and it referred to its product as "the world's foremost commodian." The company was sued by TV comedian Johnny Carson, who had hosted *The Tonight Show* for many years. On the show each night, he was introduced with the phrase "Here's Johnny," and the phrase came to be associated with Carson by a substantial segment of TV viewers. Carson believed his identity had been wrongfully capitalized upon, and the federal appeals court agreed: "The right of publicity . . . is that a celebrity has a protected pecuniary interest in the commercial exploitation of his identity. . . . Carson's identity may be exploited even if his name, John W. Carson, or his picture is not used."<sup>11</sup>

A particularly troublesome area of the law in recent years has involved the use of celebrity look-alikes and sound-alikes. Under the traditional rule, it is not considered commercial appropriation to feature in advertising someone who looks or sounds like a particular celebrity, without the celebrity's consent. This is simply because it is not the celebrity plaintiff's actual picture or voice that is being used. But when the look-alike or sound-alike is used in a manner likely to confuse the public, some courts have allowed the celebrity to recover damages, either on a right-of-publicity theory or on some other ground.

A 1988 case involved these facts: The advertising agency of Young & Rubicam had approached singer/actress Bette Midler to perform her 1970s hit "Do You Want to Dance?" in a series of commercials for Ford Motor Company. Midler refused, so the agency, without Midler's consent, hired one of her former backup singers to imitate Midler's voice as closely as possible. The imitation was

convincing, and Midler sued for appropriation. The federal Court of Appeals acknowledged the usual rule that imitation does not amount to appropriation, but the court nevertheless held that in the narrow circumstance “when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.”<sup>12</sup> A jury eventually awarded Midler \$400,000.

Another 1988 case involved filmmaker and clarinet entertainer Woody Allen, who sued a clothing store and its advertising agency for unauthorized exploitation of his likeness. A magazine ad for the store had featured Allen look-alike Phil Boroff posed with a clarinet. A federal trial court in New York reiterated the usual rule in that state that invasion-of-privacy law extended protection only to likenesses of the plaintiff, not to photographs of someone else. However, the court awarded summary judgment to Allen on another theory—unfair competition under the federal Lanham Act. All that was required for Allen to have a valid claim under this federal statute was a false representation that the store’s products were associated with Allen in some way. Such a likelihood of confusion existed, the court held, despite a small disclaimer that appeared under the photo.<sup>13</sup>

Taking the element of likeness a significant step further was the 1992 case of *White v. Samsung Electronics*.<sup>14</sup> The electronics company ran a magazine advertising campaign in which its products were depicted in humorous, futuristic settings. The basic theme was that its products were of such quality that they would remain in operation well into the future. One of the ads, for Samsung video recorders, depicted a robot dressed in a wig, gown, and jewelry. The robot was posed next to a game show board resembling that of the long-running show *Wheel of Fortune*. This conjured up the image of game show host Vanna White, and she sued for appropriation.

The federal District Court granted summary judgment against White on grounds that the ad did not actually use White’s name or likeness, nor would readers confuse the robot for an actual picture of White. But the Court of Appeals reversed. Applying California law, the court said appropriations of identity in that state could be accomplished through many means other than name, picture, look-alike, or sound-alike. If a celebrity’s identity is commercially exploited, the court held, then the celebrity’s rights have been invaded, no matter how that identity was conveyed. And in this case, the court concluded, the total circumstances of the ad clearly evoked the identity of Vanna White.

In the decade following the *White* case, a number of other celebrities have filed lawsuits based on unauthorized imitations. A few of these plaintiffs have won in court, others have lost, and still others have obtained settlements for undisclosed amounts. The law concerning imitations in advertising remains unsettled in many jurisdictions. National advertising campaigns must conform to the law in states known to be the strictest, such as California and New York.

## CONSENT

There is a tendency to think that people won't sue for appropriation unless their images are used in some offensive fashion, or that if they do sue it won't be a case worth much money. But these can be dangerous assumptions, especially when using names and images of celebrities.

A case in point: *Los Angeles Magazine* carried a feature titled "Grand Illusions" in which it used computer technology to alter famous still photos of film stars and make it look as though the stars were wearing the latest spring fashions. Without consent the magazine published a photo of actor Dustin Hoffman as he appeared in the 1982 film *Tootsie*, dressed in a gown and high heels, but with the fashion alteration. The text read: "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels." Hoffman, who during thirty years of celebrity status had refused to permit commercial uses of his identity, sued for appropriation of his right of publicity. In federal trial court Hoffman won \$1.5 million in compensatory damages, representing the fair market value of his name and likeness used for endorsement purposes, and another \$1.5 million in punitive damages. In 2001 the appellate court reversed on grounds that it was not a commercial use but rather an editorial feature.<sup>15</sup> But the case well illustrates the potential severity of damages.

When in doubt communicators should protect themselves by obtaining consent. Even if the initial intent is not to use the material in a commercial context, that opportunity may present itself later on. This is especially true for freelance photographers and the publications that use their work. A photo may have first been taken and published simply because it seemed newsworthy; later an advertiser may offer to buy the picture for use in a campaign. At that point, having the prior consent of the individual in the photo serves a dual purpose: It protects against appropriation lawsuits and it makes the photo more marketable.

### **Model Releases**

In some states the appropriation laws say consent for commercial uses is valid only if it is in writing. And that's the prudent way to document consent, whether it's required or not. For photographs and video, consent is normally obtained on the spot by photographers who carry forms known as **model releases** or **photo consent forms**. Aware that the law is not always clear about what constitutes a commercial use, many magazines and book publishers require a signed model release in all cases. A typical release form might read something like the one in Exhibit 5.1.

Of course, some release agreements are much more complicated than this, at the desire of one or all parties concerned. For example, the release might be very specific, either about the degree to which photos or video may be altered or about the purposes for which they may be used. It is generally in the best interest of the media to have releases worded in broad terms to cover future,

## EXHIBIT 5.1 Sample Model Release

In exchange for valuable consideration, I hereby irrevocably consent to the use and reproduction by you, [photographer's name], or anyone authorized by you, of any and all photographs that you have this day taken of me, for any purpose whatsoever and through any or all media, without restriction as to alterations, and without further compensation to me. All negatives, positives, and prints shall constitute your property, solely.

Date: \_\_\_\_\_

Model signature: \_\_\_\_\_

Address: \_\_\_\_\_

unforeseen uses. On the other hand, the individuals being used—especially if they are highly marketable models or celebrities—will sometimes consent only to clearly specified, narrowly restricted uses.

In any case, following are a few important points to remember about consent: First, people under eighteen years of age, minors, are deemed incapable of giving valid consent. Therefore, a parent or guardian must also sign the release form on the minor's behalf.

Second, when consent is given gratuitously—that is, not in exchange for money or something else of value—the consent may legally be withdrawn at any reasonable time prior to publication. Gratuitous consent is not a binding contract, so the individuals giving consent retain the right to change their minds. If communicators want to lock in consent for the long term, the release must be worded in the form of a contract, and something must be paid in exchange for the consent obtained. The sample release language in Exhibit 5.1 is in contract form because it begins: “In exchange for valuable consideration. . . .” The “consideration” may be as little as one dollar, but something of value must be exchanged in order to solidify a contractual form of consent.

Finally, even though a release may be worded in broad, open-ended terms, courts have often held that reasonable limitations are implied. For example, the consent might be deemed invalid after the passage of many years unless the terms are specific on this point. Similarly, courts might not interpret blanket consent language to cover either drastic alterations to a photo or degrading uses of it. It is also highly unlikely that courts would uphold an individual's consent to be libeled, even if the consent language specifically attempts to absolve you of such liability, unless the defamatory portrayal has been clearly specified. Under the law only a **knowing consent**—that is, conscious and intentional approval—is a valid consent. Exhibit 5.2 offers some further tips on working with models.

## EXHIBIT 5.2 Working with Models

Photographers, advertising professionals, magazine editors, and others who work with models should take precautions to avoid ending up in legal squabbles down the road. This is especially true in the digital age where, often to models' dismay, their images may end up on Internet sites the models did not anticipate. Brad Fitzgerald, a Las Vegas photographer and website architect who works with hundreds of models, offers the following tips for avoiding legal hassles over models' publicity rights:

- Before a photo shoot, ask models to sign a release that's worded as broadly as circumstances will allow. It should cover not only your immediate intentions for the photos but also all plausible uses by those to whom you may later wish to market the images.
- Make sure the model knows what particular benefit he or she is getting in exchange for granting the release of publicity rights. The benefit could be free or lower-rate photography services to the model, higher modeling fees, special publicity, or other compensation, depending on the circumstances.
- Explain the release and offer to provide a copy for the model to keep.
- Keep a well-organized file of releases for yourself, so that you can quickly find a release years later if you need to.
- Make sure the terms of the model release are not contradicted by another signed document, such as a model-agency voucher, in a way that might legally compromise the model release.
- If the model is under age 18, make sure a parent or legal guardian also reads and signs the release.
- Build a reputation as a models' ally, rather than an adversary or opportunist. And at all times, keep the relationship with a model strictly professional, never social.

*Courtesy of Brad Fitzgerald, fitzgeraldmultimedia.com.*

### The Borat Cases

The importance of consent forms was illustrated by a number of lawsuits filed in 2006 following release of the feature film "Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan." The movie, which grossed over \$200 million at the box office, pokes fun at supposedly sophisticated U.S. society. Many of the bizarre scenes were actually filmed documentary-style, featuring "average" Americans who signed consent forms in advance of filming and were paid a few hundred dollars. After seeing how ridiculous they ultimately appeared on film, several of those who appeared in the movie filed claims for appropriation, alleging that the consent forms were invalid because they were misleading or fraudulently induced. But as of late 2009 none of the plaintiffs had won, although some appellate proceedings still were pending.

Indicative of the cases was *Psenicska v. Twentieth Century Fox*, in which three plaintiffs were grouped together. One was a driving instructor in real life and two provided etiquette training. All three sued for damages after feeling insulted by their portrayals in the movie. The federal district court dismissed the claims for appropriation. All the plaintiffs had signed consent forms stating in part that they waived "any claims against the producer, or anyone associated with the film, that include assertions of infringement of rights of publicity or misappropriation. . . ."

The court held that each plaintiff had signed a valid consent form that fully barred the claims they were now attempting to litigate.<sup>16</sup>

## **SPECIAL PROBLEM: DECEASED CELEBRITIES**

In appropriation law, one of the ongoing debates is whether a legal right over publicity should survive death. In other words, if you publish in an advertisement the picture of a famous football player who died last year, should the athlete's widow be allowed to sue you for appropriation, just as the football player could if he were alive? In many states this question has not been settled. And, among those jurisdictions where it has been settled, the states are split.

Generally speaking, in states that distinguish a separate right-of-publicity offshoot of appropriation, that right is viewed as a property interest, not merely a tort. As such, a celebrity may assign the right to others, and enforceability of the right survives the celebrity's death. In states where a separate right of publicity is not recognized apart from the personal privacy protections of appropriation law, the typical rule is that the claim must be filed and pursued, if at all, by the individual whose name or likeness was used.<sup>17</sup>

Several states have passed statutes that specifically allow appropriation claims to be filed after death by the exploited individual's heirs or the heirs' designated agents. Most important is the California statute that establishes a transferable property right in an individual's "name, voice, signature, photograph or likeness" if it had commercial value at the time of death.<sup>18</sup> A list of the claimants to these celebrity publicity rights—a "successors-in-interest" list—is maintained by the California Secretary of State's office. The right expires seventy years after the celebrity's death. Certain unauthorized uses, such as for news reporting, are privileged. The significance of such statutes is that advertisers may have to pay substantial licensing fees to the heirs of deceased celebrities before using their identities in advertising campaigns. The statutes generally apply only in cases in which people, such as film and music stars, commercially exploited their persona commercially during their lifetime.

## **FIRST AMENDMENT CLASH**

Historically, most appropriation cases concerned relatively easy distinctions between permissible news uses of people's identities and impermissible exploitation of their identities for advertising purposes. However, many of the recent appropriation cases raise significant First Amendment concerns and beg for further court clarification of the line between free speech and invasion of personal rights of privacy or publicity.

For example, an artist specializing in charcoal sketches of celebrities produced and sold prints and T-shirts bearing a sketch of the famous deceased comedy





### Appropriation

- Is the context commercial, such as a product advertisement or promotion?
- Is someone identified by name, photo, voice, or otherwise?
- Is the person being exploited for commercial gain rather than appearing incidentally?
- Was proper consent obtained (e.g., a written photo release)?

personalities, the Three Stooges. Under California's deceased celebrity statute, the owner of the Stooges' publicity rights sued to collect the profits and attorney fees. The artist raised the First Amendment, arguing that selling the sketches should be fully protected as art, as expression of a message, and as expression about people who remain newsworthy. But the Supreme Court of California in 2001 said the artist's First Amendment rights in this case were outweighed by the right of publicity because the artist merely appropriated the comedy trio's image and fame. The artist did not transform the images of Curly, Moe, and Larry into any new message, political or social. Rather, he was just selling the celebrities' images as they themselves had created them.<sup>19</sup>

Cases such as this raise many interesting questions: Would the result be different if the T-shirts depicting the Three Stooges also contained the words "In Memory" or "We Miss You, Stooges" or some other message?<sup>20</sup> What if the images had been altered somewhat so that they became parody, a form of commentary on current social or political affairs?

## DISCLOSURE OF PRIVATE FACTS

Mention invasion of privacy by the mass media and it is this second kind—unwarranted publicity about private life—that often comes to people's minds. For a working definition, this tort may be described as the public disclosure of embarrassing and un-newsworthy **private facts**, which a reasonable person would find highly offensive.

Note that this law runs contrary to traditional American precepts about freedom of expression by allowing mass communicators to be sued for the dissemination of truthful information. Strong sentiment exists for legally protecting an individual's personal secrets and private moments because the mass media have the power to obliterate privacy in short order. The perceived threat of mortifying exposure by the mass media is probably greater today than it was in 1890, when Warren and Brandeis published their influential law review article. To a large extent, this privacy issue must be relegated to society's ethical discourse and standards, not to legal rules, and the courts have recognized this. If applied broadly, this tort could

have a tremendous chilling effect on legitimate media activity. So the tort has been confined to narrow boundaries, and successful lawsuits against the media have been infrequent.

Here again, it is necessary to break down the definition of this tort and examine its important elements.

## PRIVATE LIFE

This tort concerns the dissemination of accurate information—facts. In this respect it is easily distinguishable from defamation. Truth is no defense; rather, it is part of the problem. But these disclosed facts must also have been truly *private facts*. No liability exists under this tort for giving further publicity to information that was already generally available to the public. It is not enough that an individual now wants to keep certain information private. The plaintiff must prove that the information *was* private until the media came along and let the cat out of the bag. The disclosed information must indeed have been treated confidentially by the plaintiff, not spread across town to anyone who would listen.

But prior disclosures by an individual plaintiff, if limited and selective, will not necessarily diminish the private nature of those facts in the eyes of the law. Information relayed in confidence to family, close friends, a physician or an employer, for example, may still be private in character. Following are some additional guidelines for determining whether information is private.

### ***Public Settings***

Events that occur in public view are almost always considered public, not private, information. A 1976 case against *Sports Illustrated* is often cited as an example of this principle. A photographer for the magazine took pictures of some Pittsburgh Steelers fans who were hamming it up atop a dugout before a football game. From thirty photos of the fans, the magazine published one to illustrate an article titled “A Strange Kind of Love,” about the Steelers’ rowdy fans. The picture, however, was a close-up of one of the fans with his trousers left unzipped; that fan sued, claiming his slovenly behavior was a private matter.

Though the photo was not anatomically revealing, a federal court agreed that the magazine had deliberately exhibited the fan in an embarrassing manner. Yet this wasn’t enough. The court denied the plaintiff’s claim because the photo simply did not reveal anything that was private. The fan’s embarrassing behavior had been observable by the general public, and he had even dared the photographer to take pictures. The court wrote: “A photograph taken at a public event which everyone present could see, with the knowledge and implied consent of the subject, is not a matter concerning a private fact.”<sup>21</sup>

This principle—that events in public places are fair game—is often observed by the courts. Rare exceptions can be found, however. For example, contrast the

Pittsburgh case with a 1964 case against an Alabama newspaper. A woman and her two sons had decided to wander through the fun house at a county fair, unaware of what to expect. As she exited, the woman's dress was blown up by air jets beneath the fun house platform. As fate would have it, a newspaper photographer captured this instant on film. A few days later the photo ran on the front page, showing the woman exposed from the waist down except for her panties.

The Alabama Supreme Court upheld an invasion-of-privacy judgment in favor of the woman, even though it acknowledged the scene had occurred in public. Unlike the case of the Steelers fan, this woman's embarrassing predicament was instantaneous and involuntary. The court wrote: "To hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene would be illogical, wrong, and unjust."<sup>22</sup>

### **Public Records**

Another principle is that information cannot be deemed private in nature when it is obtained from the public record. This is the rule from an important 1975 U.S. Supreme Court case, *Cox Broadcasting Corp. v. Cohn*.

A teenage girl in Georgia had been raped, and she died. Six youths were soon indicted in the death and rape. These facts were reported prominently in the media, but a state law prohibited public disclosure of the victim's identity. During court proceedings several months later, a TV reporter was allowed to examine the indictments and from them learned the name of the victim. He broadcast the name later that day. The girl's father sued the reporter and station owner Cox Broadcasting, arguing that his own right to privacy had been invaded by the broadcast of his deceased daughter's name.

The Court ruled in favor of the defendants, based on First Amendment rights. The Court first noted the well-established privilege under defamation law, that those who see and hear what transpires at trials and other public proceedings can in turn report it with impunity. Then the Court turned to the privacy arena and concluded that "even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record."<sup>23</sup>

Finally, the Court put its own constitutional stamp of approval on that developing principle in privacy law. Wrote Justice White:

We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the press to inform their readers about the public business and yet stay within the law. . . . Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others, reliance must rest on the judgment of those who decide what to publish or broadcast.<sup>24</sup>

This **public record privilege** is applied to all branches of government; it is not limited to court records. Nor is the privilege actually limited to information in documents; it encompasses generally the words and events of public proceedings. Communicators must be careful, however, because the privilege is limited to *public* records and proceedings. And not all government records are legally classified as public. (Detailed discussions of this problem appear in Chapters 6 and 7.) Therefore, if through clandestine or persuasive means you gain access to such material, you might end up disclosing facts that are deemed private. In such cases you may need to fall back on the newsworthiness defense, to be discussed shortly.

Note also that the *Cox* case stands only for the rule that neither criminal nor civil law may prohibit the disclosure of information that has already been learned from the public record. The *Cox* ruling does not prohibit a privacy-conscious government from trying to prevent the media from learning the information in the first place—by sealing certain court documents, for example, or by concealing names. In court documents, the identities of parties to a legal proceeding are sometimes kept confidential by using the fictitious names Roe or Doe.

### ***Privacy in a Name?***

Under what circumstances, if any, might a person's name, telephone number, or address be considered a private fact for purposes of a lawsuit? Consider this actual case: About midnight a woman (Jane Doe) returned to her apartment and found the dead body of her roommate on the floor. She had been beaten, raped, and strangled. Doe then looked up and found herself face to face with a man. She fled the apartment, found a police officer, and provided a description of the suspect. A summer intern for the *Los Angeles Times* was assigned to cover the story. She learned Doe's real name and, in an article published the next day, identified Doe by name as the discoverer of the body. The article also reported that "one witness" gave police a description of the suspect, who was still at large. Doe, who then lived in fear that the killer would track her down, sued the *Times* and the reporter for invasion of privacy.

Would it matter in this case how the news reporter obtained Doe's name? Would it matter if the reporter did not know that the person who discovered the body and the person who described the suspect were one and the same? This case was eventually settled out of court for an undisclosed sum.<sup>25</sup>

## **HIGHLY OFFENSIVE DISCLOSURE**

Even if truly private information is disclosed, no privacy claim exists unless the disclosure is one that would be highly offensive and objectionable to a reasonable person of ordinary sensibilities. The question is not merely whether a plaintiff was agitated and embarrassed by the disclosure of facts; rather, the plaintiff must convince the court that it is reasonable to react in that manner. In other words, the disclosure must have clearly overstepped prevailing notions of decency.

Although they may have been guarded secrets, some kinds of information simply don't meet this offensiveness test. For example, publication of a secret family meatloaf recipe would not tend to shock a reasonable person's notions of decency. But you should approach very cautiously disclosures of sexual confidences, unusual or stigma-laden physical disorders, mental disorders, extremely bizarre personal habits, or photos of people unclothed.

## NOT NEWSWORTHY

Even with the elements discussed so far, a private facts claim cannot succeed unless the court is also convinced that the information disclosed is of no legitimate public interest or concern. One might publish facts that are both private and highly objectionable, but the publisher is safe from liability if the facts are newsworthy, in a loose sense of that term. This **newsworthiness defense** is legal acknowledgment that the public has a right to know in some cases, even at the expense of an individual's privacy.

The big difficulty, of course, is drawing a legal line between what is of legitimate public interest and what is not. This has been a tough task for the courts, and the articulated newsworthiness tests vary from state to state. One general approach has been to avoid the quagmire of strict definitions altogether by simply asking juries to consider whether the disclosures were in line with customary news content. Other courts, such as those in California, profess to use a more structured balancing test that weighs (1) the social value of the facts disclosed against (2) the depth of the intrusion into private affairs.

Courts may weigh a third factor: The extent to which the plaintiff voluntarily sought a position of notoriety. Private facts about public figures are more likely to be considered within the scope of legitimate public concern. Courts have often ruled, however, that even public figures are entitled to keep private some facts of their domestic activities and sexual relations. As a further guideline, courts have often stated what will not be considered newsworthy: information that represents a morbid or sensational prying into private lives for its own sake. In the fun house case, for example, the photo of indecent exposure was characterized by the court as a mere curiosity piece, published precisely because of its embarrassing quality and not because it added insights to the write-up on the state fair.

### ***Legitimate Public Interest***

Most contemporary courts would likely reach a different conclusion about the fun house photograph and give greater latitude to editors. Here's an example from *Sports Illustrated*, in which a court gave broader meaning to the notion of newsworthiness: The magazine had prepared an article about a dangerous body-surfing beach in California that was known as the Wedge. The story included information about a man, Mike Virgil, who was considered the most daring surfer

at the beach. When the magazine telephoned the surfer to verify some facts, he learned that the article would deal not only with his surfing prowess but also with some bizarre behavior in his personal life. This behavior included diving head first down flights of stairs, eating live spiders and other insects, and extinguishing a cigarette in his mouth.

Virgil asked that he not be mentioned in the article, but the magazine published the story as planned. In a lawsuit for invasion of privacy, the court sided with the magazine. The facts did not represent sensational prying for its own sake, said the judge, but instead were related to a legitimate story. He wrote:

Body surfing at the Wedge is a matter of legitimate public interest, and it cannot be doubted that Mike Virgil's unique prowess at the same is also of legitimate interest. Any reasonable person . . . would have to conclude that the personal facts concerning Mike Virgil were included as a legitimate journalistic attempt to explain Virgil's extremely daring and dangerous style of body surfing at the Wedge.<sup>26</sup>

In a 1991 case a Texas appellate court discussed the newsworthiness defense specifically in terms of a constitutional privilege. A newspaper had published a photo taken during a high school soccer game, in conjunction with an article about the game. The plaintiff was shown in the photo running full-stride after the soccer ball, but in the picture his genitalia also happened to be exposed. The exposure was caused by the student athlete's failure to wear the customary athletic supporter, the court noted.

The newspaper responded to the student's lawsuit for invasion of privacy by claiming that the suit was barred by the First Amendment and the free speech provision in the Texas Constitution because, it claimed, those provisions do not allow civil damages against a newspaper for the publication of a photo taken at a newsworthy public event. The Texas court concluded there was indeed a constitutional privilege to report private facts when connected with a newsworthy event such as a soccer game, even though offensive to ordinary sensibilities. The newspaper does not lose constitutional protection simply because it embarrasses the people it refers to; the privilege ceases to operate only when editors abuse their broad discretion to publish matters that are of legitimate public interest, the court said. The Texas court noted the contrary result in the fun house case discussed previously, but it said that case was not persuasive because the Alabama Supreme Court had not analyzed the applicability of First Amendment protection. Summary judgment was affirmed for the newspaper.<sup>27</sup>

### ***Humiliation for Its Own Sake***

Contrast the above cases with the 1983 case of *Diaz v. Oakland Tribune*. *Tribune* columnist Sidney Jones wrote this paragraph in a multiple-topic column: "The students at the College of Alameda will be surprised to learn that their

student-body president, Toni Diaz, is no lady, but is in fact a man whose real name is Antonio. Now, I realize that, in these times, such a matter is no big deal, but I suspect his classmates in P.E. 97 may wish to make other showering arrangements.” That was the entire reference to Diaz, who had undergone sex-change surgery some years earlier and went to great trouble to conceal this from the public and start a new life. Diaz sued for the publication of highly embarrassing private facts and was awarded \$775,000 in compensatory and punitive damages at trial. Wrote a state appeals court:

Contrary to defendants’ claim, we find little if any connection between the information disclosed and Diaz’s fitness for office. The fact that she is a transsexual does not adversely reflect on her honesty or judgment. . . . Nor is there merit to defendants’ claim that the changing roles of women in society make this story newsworthy. This assertion rings hollow. The tenor of the article was by no means an attempt to enlighten the public on a contemporary social issue. . . . Jones’ attempt at humor at Diaz’s expense removes all pretense that the article was meant to educate the reading public. Here Jones knew that Diaz would certainly suffer severe emotional distress from the publicity alone. Nevertheless, he added to the indignity by making Diaz the brunt of a joke. . . . The jury could reasonably have inferred from these facts that Jones acted with the intent to outrage or humiliate Diaz . . . <sup>28</sup>

As this case shows, plaintiffs can prevail when the private information is used not to illustrate or prove a point of legitimate interest, but rather for its own sake to shock or embarrass. You may be irked by the less-than-precise boundaries of this tort. However, that is reality. Boundaries are taking shape through court opinions, but they are inexact. This imprecision can—and should—cause occasional ambivalence on the part of students and professional communicators. In all of the main elements addressed here—whether facts are private, whether their disclosure would be highly offensive, and whether they are of legitimate public concern—the legal standards ultimately take into account the prevailing mores of society. These mores, of course, are subject to some change and a lot of interpretation.

Your task as a communications expert is to learn the basic rules and the factual situations that typically signal danger. But you also must realize there will always be new situations that fall into a zone of uncertainty. To some extent this is true of most areas of the law. But this tort, publication of private facts, is an especially good example of hazy boundaries that can have a chilling effect on the media.

Furthermore, some argument arises about whether prior restraints should be available in these kinds of privacy cases. Recall that in defamation cases, plaintiffs must sue for money damages after publication; no prior restraint (injunction) is available. This is generally accepted as the principle of privacy lawsuits as well.

But the decisions in private facts cases are dotted with exceptions, and the U.S. Supreme Court has not ruled directly on the First Amendment question. Judges occasionally may be responsive to requests for injunctions in private facts cases because, unlike libel situations, the plaintiff cannot use counterspeech to set the record straight and prop up a damaged reputation. Given that complaints over private facts don't rest on the inaccuracy of statements—but upon unwanted publicity—no sort of retraction, correction, or counterattack could ease the plaintiff's suffering.<sup>29</sup>

### ***The Supreme Court and Lawfully Obtained News***

The Supreme Court in 1989 added constitutional doctrine to the private facts tort in the case of *Florida Star v. BJF*. The *Star*, a small weekly in Jacksonville, Florida, had published a one-paragraph story about a sexual assault, including the victim's name. The name was obtained from a report available in the police department pressroom. Signs in the pressroom warned that rape victims' names were not considered part of the public record, however, and publication of the name was contrary to the paper's own internal policy. Also, a state statute specifically made it unlawful to publish the names of rape victims.

Under authority of the statute, the assault victim sued the *Star* for invasion of privacy and was awarded \$97,000 by a jury. In a 6–3 decision based on the First Amendment, the Supreme Court reversed. “If a newspaper lawfully obtains truthful information about a matter of public significance,” noted Justice Thurgood Marshall for the majority, “punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.”<sup>30</sup> Punishing the *Star* would not serve an interest of that magnitude, he wrote, as evidenced by the fact that, in this case, the government itself was making the information public.

It might seem that the *BJF* ruling took a huge bite out of the private facts tort. But the Court emphasized the narrowness of its ruling, and it expressly declined to hold that dissemination of the truth is always protected by the First Amendment against civil sanctions. Also, the Court found the news item to concern “a matter of public significance.” In that respect, the constitutional standard of *BJF* simply coincides with the usual common law rule limiting this tort to non-newsworthy disclosures.

### ***Special Problem: Lapse of Time***

What about media disclosures of information that, though once public, had been buried in a person's distant past and publicly forgotten? This has been an occasional problem, typically involving past criminal activity or prosecutions.

The classic example is an old case from California, *Melvin v. Reid*, popularly known as the *Red Kimono* case. In 1918 Gabrielle Darley, a prostitute, was tried for murder. It was a notorious case, but she was acquitted and then changed her life dramatically. She married, left the state, became a housewife, and “thereafter





### Disclosure of Private Facts

- Has publicity been given to heretofore private facts of another's life?
- Would the publicity be highly offensive or embarrassing to a reasonable person?
- Is the disclosed information of no legitimate public interest?

at all times lived an exemplary, virtuous, honorable and righteous life.” But seven years later a filmmaker produced *The Red Kimono*, a movie based on the deeds of the housewife’s prior life. The film used her real maiden name—Gabrielle Darley—as the name of the principal character, and the movie was advertised as a true account of her escapades. The former prostitute sued the filmmaker and won, in one of the earliest private facts cases.<sup>31</sup>

The case would be decided differently in today’s courts, however. First of all, much of the information in the film probably came from the public record of the trial. Second, the initial media coverage of her prosecution surely included additional information about her life, and that information probably would no longer be considered private. And finally, she had forever become a newsworthy personality, whether she liked it or not.

As a general rule, what was public does not later become private, and people or events once newsworthy remain newsworthy topics of legitimate recall. Furthermore, the Supreme Court in its *Cox* ruling never suggested that a lapse of time could make the contents of public records somehow private.

Communicators should be wary, however, of the “Guess Where He Was Twenty Years Ago” exposé that does not rely on information from a public record. An example of this would be a news story revealing that a local man, now a dentist, had many years ago tried to kill himself with a revolver. If the suicide attempt had been released as news at the time, legal authorities agree that the media are safe in reporting it again. This comes under the general rule that recall of past news events is a legitimate public endeavor. But if the suicide attempt had been a guarded secret all these years, it should not be assumed that the passage of time now makes disclosure less objectionable. Long-past private matters should not be published unless they would be legitimate news today. Consider the basic guidelines for newsworthiness as they would apply today. For example, if the dentist is now running for high public office, many private aspects of his past may come within the scope of legitimate public interest.

A final, important note of advice: The best way to avoid this tort is to get the affected individuals themselves to talk with you, on the record, about their private lives. Be as persuasive as you can if you think the information is important. That way you have the consent of the individual, and he cannot turn around and sue you when the information is printed or broadcast.

### ***Ethical Concerns***

Of course, the law is just one of the concerns when media are about to broadcast or publish private facts. Another one is professional ethics, and its sweep is much broader than that of the law. In most cases, the private information does not rank particularly high on the ladder of newsworthiness, and the dissemination may cause severe trauma for the individual. You may want to conduct your own public benefit/private trauma balancing test. When a significant public benefit may result, don't be timid—run it. But when the potential public benefit is next to nil and the privacy factor high, don't appear indifferent to private lives—hold off.

The media have sustained some of their worst black eyes when they seemed to be cold-heartedly preying on people's private moments, particularly with pictures. The daily *Bakersfield Californian* learned this in 1985 when it ran a front-page photograph showing the grieving family of a boy who had just drowned in a river, with the boy's body in the foreground. The scene was at a public park, so the photo presented no legal problem. But many readers thought the paper crossed the lines of decency and invaded the family's privacy. Readers were so offended, in fact, that the paper received more than five hundred phone calls of protest—and a bomb threat.

The codes of ethics for the Society of Professional Journalists and the Radio-Television News Directors Association both specify that practitioners shall respect the dignity and privacy of people encountered in the course of reporting the news.

### ***Private Facts in the Hypothetical***

Consider again the chapter Hypothetical concerning Vera Grundy. Would broadcast of any of the information or video constitute the private facts tort? Grundy's drunk driving arrest, though several years old, was on the public record and thus would be fair game legally. The cocaine incident had been kept private, but its release might not be sufficiently offensive to support a legal claim. Reporting her psychiatric treatments raises the greatest legal concern. If you were the reporter and wanted to air this, it might be wise to see if Grundy would talk about it first.

And finally, what about the hot tub video? If the tape shows intimate frolicking in the hot tub and lots of skin, broadcasting it would normally cross the legal line. If the tape shows the people simply sitting in the water chatting, the question is whether the core information itself—that these people not married to each other sit together naked in her hot tub—is still too private a matter to be broadcast without being highly offensive.

In any event, it is difficult from an ethical perspective to see the justification for broadcasting any of this material. What public purpose is served by broadcasting private and embarrassing information of this kind for a simple feature series on the lives of educators? Note how the legal and ethical balance may shift, however,

if Grundy is embroiled in a public controversy to which this information relates. Suppose she is running for a city council seat and her campaign pledge is to serve as a model citizen for today's youth. Courts now would likely deem all this information newsworthy under law, except perhaps for video of intimate conduct. From an ethical perspective, would you reach the same conclusion?

The Hypothetical presents legal and ethical problems beyond the private facts issue. For example, if Grundy is married, video of her and the men sitting in a hot tub probably would imply to viewers that she is having an affair. What if this were not true? Perhaps Grundy's husband and the other man's wife are also there, but just happened to be inside getting sodas. The false impression you created could lead to a lawsuit for another privacy tort, false light.

## FALSE LIGHT

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The third branch of privacy invasion, false light, is a tort similar to defamation. **False light** is the representation of an individual in a false and highly offensive manner before the public.

It is common for a claim of false light invasion of privacy to accompany a defamation claim, because both torts concern false information published in either a news or a commercial context. And the major elements of the false light claim are similar to those of defamation: The plaintiff must prove that the information was made public, was about the plaintiff, and was substantially false.

One thing that distinguishes a false light claim is that its aim is to compensate the individual for personal embarrassment and anguish, not for damage to reputation. Therefore, false light alone may be the appropriate claim when an erroneous public portrayal has caused personal trauma, but when there is no evidence of injury to reputation.

For example, in one of the classic early cases, a ten-year-old girl was nearly run over by a car, and a newspaper photographer took a dramatic picture of the child being lifted to her feet by a bystander. The picture was published in the paper the following day, and that newsworthy publication was privileged. But two years later the photo was published again—this time to illustrate a magazine article about pedestrian carelessness titled “They Ask To Be Killed.” Said the federal appeals court:

This use of her picture had nothing at all to do with her accident. It related to the general subject of traffic accidents and pedestrian carelessness. Yet the facts . . . show that the little girl, herself, was at the time of her accident not careless and the motorist was. The picture is used in connection with several headings tending to say that this plaintiff narrowly escaped death because she was careless of her own safety. That is not libelous. . . . But we are not talking now about liability for defamation. We are talking about the privilege to invade her interest in being left alone.<sup>32</sup>

The court concluded that the publication exceeded legal bounds, and it upheld a \$5,000 judgment for the girl. This 1951 case never referred to the false light tort by name, but the court clearly recognized the emergence of this separate branch of privacy invasion. Had the context of the publication been accurate, no other privacy theory could have allowed the girl to recover. The difference between false light and defamation also was apparent. Labeling the girl a careless pedestrian would not tend to injure her reputation. She would not be likely to lose friends or job opportunities or be ostracized at school. Yet it is the kind of erroneous characterization that would tend to be deeply aggravating in a personal sense.

Though the false light tort aims to protect a fundamentally different interest than does defamation, there is of course much overlap in the applicability of these torts. Some jurisdictions regard claims for false light and libel as duplicative. After all, any false publication that harms reputation is also likely to injure the individual's peace of mind. As long as three decades ago, some legal scholars began wondering if the false light tort would eventually engulf the whole law of defamation. But this has not happened. One explanation, perhaps, is that even though false light is a broader tort in some respects, it is in some ways narrower than defamation. For example, whereas corporations are free to sue for defamation, only individuals can sue for false light or other kinds of privacy invasion.

Of the four privacy torts, false light is the one least adopted by the states. About thirty states' court systems have recognized the tort. In 2002 the Supreme Court of Colorado expressly declined to recognize false light as a separate tort because, the court said, it overlapped too closely with defamation.<sup>33</sup> In 2008 the Supreme Court of Florida did the same. In the Florida case, the plaintiff filed both libel and false light claims after a religious organization's online newsletter falsely claimed that the plaintiff had adopted the organization's views. Florida's high court noted that the tort of defamation had been more carefully crafted over the decades to accommodate the nation's commitment to free speech and that, as a practical matter, it would be extremely rare that a sufficiently offensive false-light circumstance could not be framed as a defamation claim. Therefore, the court held that false light would not be recognized as a common-law tort in Florida.<sup>34</sup>

## FALSE LIGHT SITUATIONS

In the majority of states that do recognize false light, the cases generally fall under three categories: distortion, embellishment, and fictionalization. The distortion category is illustrated by the case of the young pedestrian described earlier. Typically it is a matter of photographs or video being used out of context. To avoid this, communicators must be extremely careful about using file pictures to illustrate stories. For example, suppose a news photographer takes a



### False Light

- Has a person been placed before the public in a false light?
- Would the false portrayal be highly offensive to a reasonable person?
- Did the communicator act with negligence or, if the subject is a public person, with reckless disregard for the truth?

picture of a young man shop-ping at a convenience store. The picture is not used at the time and is filed. But six months later, the newspaper is running a piece about shoplifting, so editors dig into the file and publish that photo along with the article, simply for purposes of graphic illustration. By doing this, the newspaper is begging for legal trouble. Mismatching the audio and video is a common danger in TV news also.

The embellishment category includes cases in which false information was added to journalistic accounts. In other words, writers were taking liberty with the news. The U.S. Supreme Court case of *Cantrell v. Forest City Publishing Co.* is a prime example of this. A bridge collapsed in 1967 and forty-four people were killed, one of them Cantrell. Several months later a reporter for the *Cleveland Plain Dealer* wrote a follow-up story on the impact of the disaster. The story stressed the poverty of the remaining Cantrell family members and the deteriorating condition of their home, but many of the facts clearly were embellished. For example, the reporter wrote:

Mrs. Cantrell will talk neither about what happened nor how they are doing. She wears the same mask of non-expression she wore at the funeral. She is a proud woman. She says that, after it happened, the people in town offered to help them out with money and they refused to take it.<sup>35</sup>

In reality, though, only the children were home when the reporter visited; he never saw nor talked with their mother, contrary to the clear implication. Other significant misrepresentations were contained in the detailed descriptions of the Cantrells' poverty. The Court affirmed a \$60,000 judgment for the Cantrells.

The fictionalization category is typified by the use of real, identifiable characters in tales that are born of imagination. The article, book, or whatever it may be, is neither pure fiction nor pure documentary, but a dangerous combination of the two. For example, suppose you wrote a story—labeled “fiction”—for a regional literary magazine. Your story is about a mild-mannered dermatologist who on week-ends leads a ring of eco-guerrillas, sabotaging construction projects, blowing up oil-drilling rigs, and threatening the lives of loggers. Although your story is primarily fiction, the main character you describe is similar to a real physician in your town who is indeed known as a controversial environmental crusader. Your fictional character is described with the same kind of beard, the same medical specialty, and a similar first name.

The test is this: Could a reasonable person reading your story believe the fictional character is in fact this particular real person? If so, you may have to deal with a lawsuit for false light (or perhaps for libel). The lesson from these fictionalization cases is that audiences must not be misled. If the work is one of fiction, don't send a contrary message to readers or viewers by injecting real people. And if the piece does begin with real people and events but shifts into fiction, this must be made clear to the audience. Also, disclaimers—stating, for example, that “any similarities to real people are purely coincidental”—will not necessarily protect against liability.

## THE ELEMENTS AND PRIVILEGES

Once the basic nature of the wrong—a highly offensive characterization, by the standards of a reasonable person—is distinguished, the remaining elements of the false light tort are much the same as those for libel. Plaintiffs must show that they were identified and that the damaging messages were substantially false. And those messages must have been made public, though this publication requirement is applied differently in privacy cases. Courts have consistently held that, in the privacy torts discussed so far, there must be dissemination to a segment of the general public. This is contrary to the rule in defamation, where communication to one other person is enough to satisfy the publication requirement.

Some of the constitutional privileges and procedural safeguards that apply in defamation cases have also been applied to false light claims. Most notably, the U.S. Supreme Court has decided that the actual malice standard fashioned in the libel case of *New York Times v. Sullivan* should also apply in false light cases. This decision was reached in the 1967 case of *Time, Inc. v. Hill*,<sup>36</sup> the first false light case to reach the Supreme Court. The Court held that in false light privacy cases involving matters of public interest, the plaintiffs must prove that defendants disclosed the information with knowledge of its falsity or in reckless disregard of the truth. This is easily proved in deliberate falsification or embellishment cases, such as *Cantrell*, but in other kinds of cases it can represent a tough roadblock for plaintiffs, as discussed in Chapter 4. Since the *Hill* ruling, the Supreme Court has narrowed application of the actual malice standard in libel law; it is no longer a public interest test that determines application but whether the plaintiff is a public figure. It is widely speculated, therefore, that plaintiff status would also be the controlling factor in false light cases, though the Supreme Court has yet to make such a ruling.

Other substantive and procedural standards from the law of defamation have also been applied in false light cases. For example, courts have held that statements of opinion cannot give rise to a false light claim and that the retraction statutes designed for defamation situations also apply when the claim is false light. Remember, too, that some states have yet to officially recognize the false light tort or have specifically declined to do so.<sup>37</sup>

## INTRUSION

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The invasion of privacy branch known as **intrusion** may be defined as the intentional invasion of a person's physical seclusion or private affairs in a manner that would be highly offensive to a reasonable person.

Note first that this privacy tort is different because it occurs during the information-gathering process, not by publication or broadcast. The aim of this law is to compensate people for the shock and embarrassment of learning that peering eyes, focused camera lenses, or live microphones were present at a time when there should have been safety from unwanted observation. When and if publication occurs in an intrusion case, it can serve to increase damages and might give rise to a related privacy tort, such as private facts.

Sometimes intrusion claims go hand in hand with claims for trespass. But intrusion may occur even when there is no trespass—when snooping occurs with the aid of powerful camera lenses or telescopes, for example. Intrusion is a privacy tort that fills the gaps left by other laws, including trespass, nuisance, infliction of mental distress, criminal eavesdropping laws, and civil rights laws.

## EXPECTATION OF PRIVACY

You might think that intrusion claims against the mass media would be frequent. But they are not particularly common, and the plaintiffs rarely win. An important reason for this is the threshold question that the law will ask: Was the individual in a place where she could reasonably expect privacy?

In most instances the answer to this question is no, in which case there can be no valid claim for intrusion. Generally speaking, a reasonable expectation of privacy can't exist on public sidewalks, at parks, on public beaches, in the aisles of department stores, or in the open dining rooms of restaurants. Individuals in these places cannot reasonably think they are entitled to go unobserved or even unphotographed.

A reasonable expectation of privacy is likely to exist in a private residence. The right to be free from unwanted observation has also been acknowledged for a few other closely controlled places, including hospital rooms, ambulances, hotel rooms, private offices, dressing rooms, and public toilet stalls. To be deemed legally secluded for purposes of this tort, it is not required that the individual be hidden from all others. As a federal court in Illinois explained in 1986: “[A plaintiff’s] visibility to some people does not strip him of the right to remain secluded from others. Persons are exposed to family members and invited guests at their homes, but that does not mean they have opened the door to television cameras.”<sup>38</sup>

A couple of cases will help illustrate these points. In one case, a television camera crew was working on a minidocumentary about paramedics. A Los Angeles

paramedic unit had been called to a private residence, and the camera crew followed, right into the bedroom, where a heart attack victim lay on the floor. The crew filmed the resuscitation efforts without obtaining the consent of the victim's wife, who waited in another room. Could a lawsuit for intrusion conceivably succeed? The California Court of Appeal said yes.<sup>39</sup>

Compare this case from the state of Washington. A television station was pursuing a story about a pharmacist who was facing criminal charges. A camera operator walked up to the exterior window of the closed pharmacy and filmed the pharmacist talking on the phone inside. The court held there could be no claim for intrusion and explained: "It is not contended that the film recorded anything other than that which any passerby would have seen."<sup>40</sup>

One of the most closely watched intrusion cases of the 1990s was *Shulman v. Group W Productions*,<sup>41</sup> which reached the California Supreme Court. Ruth Shulman was injured when her car veered off the highway and tumbled down an embankment into a ditch, coming to rest upside down. She was pinned under the vehicle and had to be freed with a device called the "jaws of life." A television camera crew arrived to record the rescue effort for later broadcast on a show titled "On Scene: Emergency Response." The camera operator captured the dialogue between Shulman and an emergency nurse as Shulman was being removed from the car. Then, when Shulman was placed in a rescue helicopter, the camera operator also accompanied the patient and continued to tape Shulman's strained dialogue with the flight nurse, who agreed to wear a microphone. Though the taping was done with the consent of the air ambulance personnel, Shulman was unaware that she was being videotaped. Shulman, left a paraplegic by the accident, sued the program producers for disclosure of private facts and for intrusion.

The California high court held that the broadcast material was newsworthy and therefore could not support a claim for disclosure of private facts. On this claim, summary judgment in favor of the media was appropriate. But the court reached a different conclusion on the intrusion claim. Although the camera's mere presence at the accident scene and the filming of the events there could not be deemed an intrusion into Shulman's seclusion, two particular aspects of the camera operator's conduct could amount to intrusion, the court said. First, Shulman might have a reasonable expectation of privacy in the interior of the rescue helicopter. The court drew an analogy to media entering a hospital room during treatment without a patient's consent. Second, the court said Shulman was entitled to some degree of privacy in her conversations with the emergency nurse at the accident scene. The camera operator didn't intrude into that zone of privacy merely by recording conversations that others at the public scene could hear with unaided ears. But by placing a microphone on the nurse and amplifying and recording everything she said and heard, the camera operator may have listened in on conversations that Shulman could reasonably have expected to be private.





### Intrusion

- Does this person have a reasonable expectation of solitude or seclusion, such as would be found in a private residence?
- Is the seclusion intentionally intruded upon, either physically or otherwise?
- Would the intrusive conduct be highly offensive to a reasonable person (e.g., by subterfuge or deception)?

Therefore the court declined summary judgment on the intrusion claim. It was for a jury to decide whether Shulman had a reasonable expectation of privacy in those instances, the court said.

In the chapter Hypothetical, you'll recall, you climbed a tree to peer into a secluded private yard. You may already have committed the tort of intrusion, even if the videotape is never broadcast. One key question would be whether the couple in the hot tub had a legitimate expectation of privacy. In answering this question, a court might consider whether neighborhood children frequently played in that tree, whether neighboring hillside homes overlooked the yard, and exactly where in the yard the hot tub was located. The fact that you had to climb a tree to get the video suggests that you may have crossed the legal line, but not necessarily.

Though most intrusion cases deal with surveillance of the plaintiffs themselves, examining private papers and records also may constitute intrusion. Again, the threshold question is whether the papers were placed where the plaintiff could reasonably expect others would not have access. What if the private records had been discarded? Does an individual retain a reasonable expectation of privacy once the private papers have been placed in a trash container near the street? Not likely. In a case involving the legality of a police search, the Supreme Court held that criminal defendants had no reasonable expectation of privacy with respect to trash placed by the side of a public street for collection. It was common knowledge, the Court said, that such trash was readily accessible to scavengers, snoopers, and other members of the public.<sup>42</sup>

## OFFENSIVENESS

When considering intrusion situations, remember that the standard of "highly offensive" is a part of this tort, just as it is with false light and private facts claims. (See Exhibit 5.3 for a comparison of the four privacy torts.) Intrusion law aims to protect people from the kind of disregard for privacy that shocks the public consciousness; it is not intended as a technicality to trap media people who are simply being assertive or thorough in seeking the news.

Courts will also look to other laws and the intruder's purpose to help determine offensiveness. Intrusive behavior will typically be held offensive for purposes of an

### EXHIBIT 5.3 Overview of Privacy Torts

	Type of interest invaded	Nature of defendant's invasion	Public dissemination required?	Main defense
<b>Private facts</b>	Right to keep private information private	Highly offensive	Yes	Newsworthiness
<b>Intrusion</b>	Right to private, secluded moment	Highly offensive	No	Privacy expectation unreasonable
<b>False light</b>	Right to be represented accurately before public	Highly offensive	Yes	Truth*
<b>Appropriation</b>	Right to control commercial use of persona	Simply without consent	Yes	Written consent

*This diagram is a simplified comparison of some key features of the four privacy torts.*

*\*Absence of actual malice is another important bar to a false light lawsuit when the false representation deals with a matter of public interest.*

intrusion lawsuit if the conduct also violated criminal laws, such as Peeping Tom statutes, or laws against wiretapping or breaking and entering. Intrusive behavior will be held not offensive when a public benefit clearly outweighs the individual's privacy. This might be the case, for example, when an apartment building owner enters to investigate an unsafe condition. However, the courts have yet to recognize an overriding public benefit for news gathering. In the 1998 *Shulman* case, California's high court explained the offensiveness standard as follows:

In deciding whether a reporter's alleged intrusion into private matters (i.e., physical space, conversation or data) is "offensive" and hence actionable as an invasion of privacy, courts must consider the extent to which the intrusion was, under the circumstances, justified by the legitimate motive of gathering the news. Information-collecting techniques that may be highly offensive when done for socially unprotected reasons—for purposes of harassment, blackmail or prurient curiosity, for example—may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story. . . .

The mere fact the intruder was in pursuit of a "story" does not, however, generally justify an otherwise offensive intrusion; offensiveness depends as well on the particular method of investigation used. At one extreme, routine reporting techniques, such as asking questions of people with information, could rarely, if ever, be deemed an actionable intrusion. At the other extreme, violation of well established legal areas of physical or sensory privacy—trespass into a home or tapping a personal telephone line, for example—could rarely, if ever, be justified by a reporter's need to get the story. Such acts would be deemed highly offensive

even if the information sought was of weighty public concern; they would also be outside any protection the Constitution provides to news-gathering.

Between these extremes lie difficult cases, many involving the use of photographic and electronic recording equipment. Equipment such as hidden cameras and miniature cordless and directional microphones are powerful investigative tools for news-gathering, but may also be used in ways that severely threaten personal privacy. California tort law provides no bright line on this question; each case must be taken on its facts.<sup>43</sup>

## USE OF SUBTERFUGE

What, then, about the use of disguises, false pretenses, hidden cameras, and the like? To what extent do these time-tried investigative reporting techniques risk lawsuits for intrusion? Consider the facts of a classic 1971 federal court case, *Dietemann v. Time, Inc.*

Two reporters for *Life* magazine visited the plaintiff's private home to investigate claims that he was a medical quack who professed healing with clay, minerals, and herbs. The reporters rang a bell, and when the plaintiff answered, they said that they needed medical help and had been sent by a friend, a Mr. Johnson. This was a trick to gain entrance, and it worked. All three went into the plaintiff's den, where one of the reporters complained of a lump in her breast. She was examined by the plaintiff, who at one point employed some unusual gadgets and what appeared to be a wand. He concluded that the reporter had eaten some rancid butter eleven years, nine months, and seven days before.

While all this was going on, the conversation was being sent by a radio transmitter hidden in the "patient's" purse to a tape recorder in a parked car. The car was occupied by another magazine employee and two law enforcement officials. Also, the second reporter was using a hidden camera to photograph the plaintiff.

A few weeks later the plaintiff was arrested for practicing medicine without a license. Nevertheless, he sued the magazine publisher for invasion of privacy—and won. Where did the reporters go wrong?

One key was that the plaintiff's den was a place where he could reasonably expect privacy from newspeople; he did not advertise his home as a place of business. In this case, the reporters' presence admittedly was gained by consent, and the court concluded that the consent was valid, even though it was gained by subterfuge. The problem occurred later, however, with the use of the audio and visual eavesdropping devices in the private den. Wrote the court:

One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that

what is heard and seen will be transmitted by photograph or recording . . . to the public at large or to any segment of it that the visitor may select. A different rule could have a most pernicious effect upon the dignity of man and it would surely lead to guarded conversations and conduct where candor is most valued, e.g., in the case of doctors and lawyers.<sup>44</sup>

Tort liability, then, does not necessarily attach to the use of subterfuge or “white lies” in order to gain access or get a source to talk. (*Note:* There are criminal laws against impersonating law enforcement officers and other government authorities.) The intrusion tort will come into play if electronic or mechanical devices are used to record or intercept the conversations and events that occur in private spheres.

The *Dietemann* case also illustrates that there is no blanket newsworthiness privilege, no First Amendment immunity, in intrusion cases. Recall that newsworthiness is a complete defense to claims of publication of private facts. But in the gathering of information there is no similar defense, even if the information clearly turns out to be newsworthy, as in the *Dietemann* case. Said the court:

We agree that newsgathering is an integral part of news dissemination. We strongly disagree, however, that the hidden mechanical contrivances are “indispensable tools” of newsgathering. . . . The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another’s home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.<sup>45</sup>

### ***Hidden Cameras***

The *Dietemann* case serves as a warning to journalists considering the use of modern photographic, taping, and surveillance equipment. The secret use of such equipment does not always amount to a tort, however. Over the past decade, courts have considered many hidden camera cases arising out of television journalism. When the equipment is used in the commercial workplace, and the journalist gains valid entry by posing as a routine customer, the courts generally do not find intrusion.

Illustrative is the 1995 case of *Desnick v. American Broadcasting Cos., Inc.* The ABC program *PrimeTime Live* had decided to produce a segment on cataract surgery and focused on Desnick Eye Center offices, which were performing more than 10,000 cataract operations a year. ABC dispatched persons equipped with concealed cameras to several of the Eye Center offices in Wisconsin and Indiana, where they requested eye exams. The physicians were secretly videotaped while examining these “patients” and while making their recommendations concerning surgery. Some of this video footage was aired on *PrimeTime Live*. Two of the

physicians sued ABC for various torts, among them intrusion. But the federal Court of Appeals concluded there was no intrusion because the taping did not invade truly private affairs or conversations. The *Desnick* court had this to say about *Dietemann*: “The parallel to this case is plain enough, but there is a difference. Dietemann was not in business and did not advertise his services or charge for them. His quackery was private.”<sup>46</sup>

In another typical case, again involving ABC’s *PrimeTime Live* show, journalists posing as prospective business associates visited a medical lab in Arizona. They met with the lab’s owner in an administrative conference room, talked about business opportunities, and took a tour of the facility. But in reality they were working on a segment about high-volume labs that may rush Pap smear analyses and therefore miss evidence of cancer. One of the ABC staff secretly filmed the discussion and tour with a small camera concealed in his wig. The lab’s owner sued for intrusion. But in 2002, the federal appellate court granted summary judgment in favor of ABC, saying the plaintiff had no reasonable expectation of privacy in the semi-public lab areas visited by the journalists who were, after all, invited into those areas. Furthermore, the degree of intrusion by ABC would not be highly offensive to a reasonable person, the court said.<sup>47</sup>

Still, this does not mean that infiltrating a commercial workplace with hidden cameras will never amount to intrusion. In yet another case involving ABC, a reporter obtained employment as a “telepsychic” in the Los Angeles office of the Psychic Marketing Group. She wore a small video camera hidden in her hat to covertly tape her conversations with co-workers, one of whom later sued for intrusion. The California Supreme Court in 1999 held that in a workplace such as this where the public generally does not have access, employees may enjoy a legitimate expectation that their conversations with co-workers will not be secretly videotaped—even if those conversations are not completely private from all others in the workplace.<sup>48</sup> Thus, the tort of intrusion does not allow a bright-line rule that journalists are always free to tape their conversations in an office or other workplace. (In some cases, clandestine taping can lead to other legal claims, such as fraud, trespass, and criminal violations of wiretap statutes. These will be discussed later in this chapter.)

### ***Duping Friends and Relatives***

In the *Dietemann* case noted previously, the court said potential plaintiffs generally assume the risk that acquaintances are not always who they claim to be. A misrepresented identity, by itself, would not be grounds for an intrusion case. But what if the media use false pretenses to pry confidences from others who the plaintiff *should* be entitled to trust—the plaintiff’s close friends and relatives?

In another California case, *Taus v. Loftus*, the state’s supreme court in 2007 tackled this difficult issue. The plaintiff had been the unidentified subject in a published case study about her apparent recovery of a long-repressed memory of

childhood abuse. Writers for two other publications were skeptical of the study and proceeded to closely examine the case. Eventually their critical articles were published, and although the subject of the study was kept anonymous, private details of her childhood were disclosed. These included details obtained from her former foster mother, her biological mother, and other confidants. The subject of the case study sued the publications for infliction of mental distress, fraud, defamation, disclosure of private facts, and intrusion. Though the facts were much in dispute, the plaintiff claimed that the reporters extracted information through misrepresentation. For example, one reporter allegedly told the plaintiff's former foster mother that the reporter was a colleague and supervisor of the trusted researcher who conducted the original study.

The California Supreme Court noted that the defendants generally had acted within their rights of free speech on a matter of legitimate public interest—the validity of a funded research study. And for various reasons all of the legal claims were dismissed, except for intrusion. The court concluded that while a person generally has no grounds to claim intrusion against a relative or friend for voluntarily disclosing personal information him or her, a violation of one's reasonable expectation of privacy might indeed occur when a third-party, such as a news reporter, mines information from relatives or friends by using deceptive and unanticipated tactics. Protecting this close zone of privacy against such shocking trickery and prying is exactly what the intrusion tort is for, the court said. The case therefore was sent back down for a trial on the facts.<sup>49\*</sup>

## PUBLIC PLACES

As mentioned, it is a nearly steadfast rule that the media are safe to observe, follow, or photograph people in public places. This is certainly true as long as the observer is not using electronic eavesdropping or taping devices that significantly expand what other observers could see and hear. Even in public, however, the law recognizes a small zone of privacy. The most notable case is *Galella v. Onassis*,<sup>50</sup> a protracted legal battle involving a freelance photographer who habitually hounded former First Lady Jacqueline Kennedy Onassis and her children. The photographer jumped into the path of young John Kennedy while he was riding his bicycle; he invaded the children's private schools; and at one time he came uncomfortably close in a power boat to where Onassis was swimming. Galella often jumped and postured while taking pictures of Onassis and the Kennedy children at extremely close range whenever they ventured out in public.

Onassis sought an injunction against Galella, claiming that he invaded her privacy, assaulted her, harassed her, and intentionally inflicted mental distress. The court granted the injunction. It did not prohibit Galella from taking photos, but it did forbid him to approach within twenty-five feet of Onassis and thirty feet of her children. On what legal basis could such an injunction be granted?

The photographer's conduct fell within the definition of criminal **harassment** under New York law. The violation occurs "when with intent to harass, a person follows another in a public place, inflicts physical contact or engages in any annoying conduct without legitimate cause." Conduct sufficient for criminal harassment could also amount to the tort of intrusion, the court wrote:

[Galella's] endless snooping constitutes tortious invasion of privacy. . . . He has intruded into her children's schools, hidden in bushes and behind coat racks in restaurants, sneaked into beauty salons, bribed doormen, hatcheck girls, chauffeurs, fishermen in Greece, hairdressers and schoolboys, and romanced employees. In short, Galella has insinuated himself into the very fabric of Mrs. Onassis' life and the challenge to this court is to fashion the tool to get him out. . . . As we see it, Galella's conduct falls within the formulation of the right of privacy. . . . The surveillance, close-shadowing and monitoring were clearly "overzealous" and therefore actionable.<sup>51</sup>

This was a very unusual case, of course. Surveillance of people in public places generally poses no legal problem. But if the surveillance is clearly overzealous, habitual, and obnoxious, in rare cases the courts may declare an illegal intrusion upon privacy or find some other legal theory by which to protect the plaintiff.

## LIMITS OF LIABILITY

In order to be liable for intrusion, one must have actually ordered or participated in the intrusive acts. This point was illustrated in *Pearson v. Dodd*, a 1969 federal appeals case. Former employees of a U.S. senator entered the senator's office without authorization, removed documents from files, and copied them. The copies were turned over to columnist Jack Anderson, who was aware the copies had been obtained by stealth. Dodd sued Anderson for intrusion, but the court ruled in favor of the columnist. Anderson had not requested the documents, so he did not become liable for intrusion simply by accepting them. The court explained:

A person approached by an eavesdropper with an offer to share in the information gathered through the eavesdropping would perhaps play the nobler part should he spurn the offer and shut his ears. However, it seems to us that at this point it would place too great a strain on human weakness to hold one liable in damages who merely succumbs to temptation and listens.<sup>52</sup>

## COMPANION TORTS

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In real life, privacy lawsuits are rarely limited to a single legal claim or cause of action. The plaintiff will typically allege that two or more of the foregoing privacy torts arose from one irritating sequence of events. Furthermore, these privacy

claims are frequently coupled with allegations of other torts that in some way relate to honest dealings, peace of mind, and personal space. Among these torts are fraud, intentional infliction of emotional distress, and trespass.

## FRAUD

The tort of **fraud**, misrepresentation, or deceit is not a traditional component of courses in communications law. However, in recent years numerous plaintiffs have alleged fraud in cases where the media, armed with hidden cameras and microphones, have implied or expressly stated falsehoods to gain access to private meetings, workplaces, and sources' homes.<sup>53</sup> Therefore, a brief discussion of this tort is warranted.

Fraud is committed when a defendant (1) makes a false representation of significant fact, (2) knowing the representation is false, (3) intending to induce reliance upon the misrepresentation, and (4) where the plaintiff did justifiably rely, resulting in damage. The tort is commonly alleged in connection with the sale of vehicles, real estate, and other investment properties, where buyers often must rely upon the inside information provided by sellers and trusted experts. But mass communication professionals can run some risk of this tort, too, when they misrepresent themselves or their intentions.

The most publicized of the media fraud cases has been *Food Lion v. ABC*.<sup>54</sup> In 1992 producers of ABC's *PrimeTime Live* received tips alleging that Food Lion stores were engaging in unsanitary meat-handling practices, such as grinding out-of-date beef with new beef and redating meat not sold by its expiration date. ABC decided to investigate under cover by having two reporters obtain deli department jobs with the grocery chain. They submitted applications with false identities and references and misrepresented their work experience. Based on these false applications, the reporters were given jobs at Food Lion stores in North and South Carolina. One reporter worked for a week, the other two weeks, and during that time they used tiny concealed cameras to record several apparent unsanitary actions by employees. Some of the footage was used in a *PrimeTime Live* broadcast.

Food Lion sued ABC and its reporters, challenging not the accuracy of the broadcast but the methods by which the video was obtained. A federal jury found ABC liable for fraud and awarded \$1,400 in compensatory damages and \$5.5 million in punitive damages. The District Court judge ruled the punitive award excessive and reduced it to \$315,000.

But in 1999 the Court of Appeals altogether eliminated the damage award for fraud. The court said that under North and South Carolina law, the plaintiff could collect only for damage resulting directly from reliance on the misrepresentations, and the court found no such damage. Food Lion suffered reputational harm from the broadcast, but to recover for such harm the store would have to



sue for defamation, the court held. Furthermore, the court said the loss of consumer goodwill in this case was not the result of the ABC reporters' misrepresentations, but rather of Food Lion's own actions. Food Lion sought to recover at least its administrative costs of making the short-term hires. But the court said the reporters made no representation about how long they would work and that they did work suitably for the short time they were on the job. Therefore, there was no proved harm from the false applications.

One of the three judges wrote a dissenting opinion, however, indicating he would have upheld the jury's finding of fraud because the reporters "never intended to work as loyal employees for Food Lion and to promote the business of Food Lion," as the employer had a right to expect.

## EMOTIONAL DISTRESS

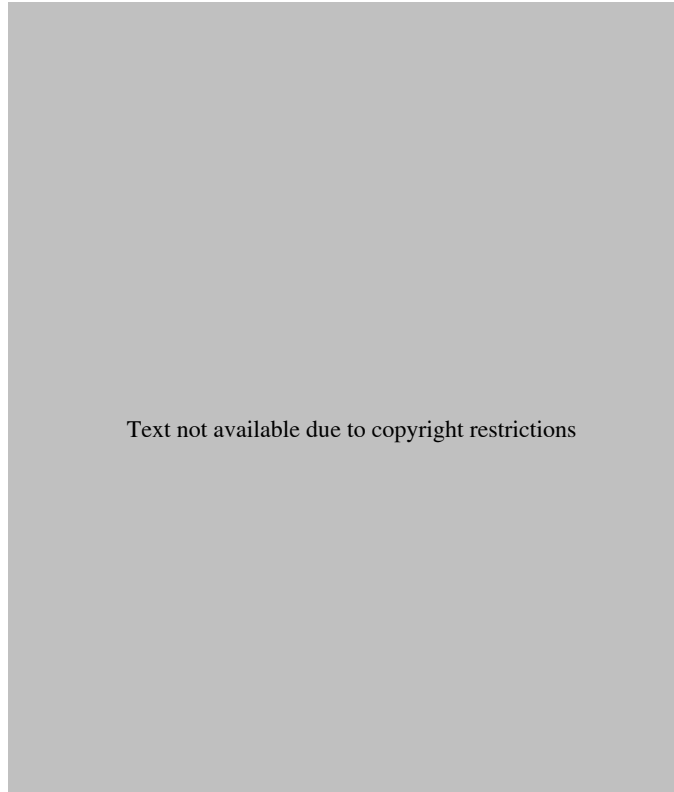
Another tort, **intentional infliction of emotional distress**, has crept into communications litigation in recent years. Though the law is not aimed specifically at privacy invasions or at mass communications, it is a tort theory that is advanced occasionally in the kind of privacy situations discussed in this chapter. The tort may be defined as outrageous conduct that is calculated to cause, and does cause, severe mental or emotional distress. In some states the tort goes by the simpler name of **outrage**.

Typically, this legal claim has been used to recover for such indiscretions as practical jokes that far exceed the bounds of ordinary behavior and cause extreme humiliation. But emotional distress lawsuits have also been brought, sometimes successfully, against mass communicators in situations involving disclosure of private facts, false light, and intrusive surveillance.

The elements of this tort are relatively simple. First, there must be outrageous or highly offensive conduct, as judged by the reasonable person of average sensibilities. Note that this element is similar to elements in three of the privacy torts (false light, private facts, and intrusion). Second, the defendant must have acted with the intent to cause mental distress or with reckless disregard of the probability that such distress would occur. Finally, the plaintiff must prove that severe emotional distress did result.

### **Harsh Satire and the Hustler Case**

The U.S. Supreme Court in 1988 curtailed the advancement of this tort to some extent with its opinion in *Hustler Magazine v. Falwell*.<sup>55</sup> The inside front cover of Hustler magazine had featured a parody of an advertisement for Campari liqueur. It was titled, "Jerry Falwell Talks About His First Time." Copying the general form of the real Campari ads, *Hustler's* editors drafted a mock interview with the nationally known minister and described his "first time" as a drunken sexual encounter with his mother in an outhouse (Exhibit 5.4).



Falwell sued for libel, invasion of privacy, and intentional infliction of emotional distress. He lost on the first two claims, but a jury awarded him roughly \$200,000 in compensatory and punitive damages on the emotional distress claim. The U.S. Supreme Court reversed, however, ruling that the standard of *New York Times v. Sullivan* must also apply to this tort. Chief Justice William Rehnquist,

writing for a unanimous Court, said that to uphold Falwell's claim would be to also subject political cartoonists and satirists to liability even though no one had been falsely defamed, and this would be a result abhorrent to the First Amendment. Wrote the chief justice:

[Falwell] would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.<sup>56</sup>

The upshot of the *Falwell* case is that a public person may not recover for emotional distress inflicted by critical expression without showing in addition that the defendant published with actual malice false statements that were represented as truth. When the expression is clearly satire, no such representation exists. It remains to be seen whether this *Falwell* standard, which significantly limits the ability to sue for emotional distress caused by publication, will also be applied to private plaintiffs.

In addition to the *Falwell* case's direct impact on intentional infliction cases, the unanimous ruling also serves as a strong reaffirmation of the Court's support for the actual malice standard when public figures sue the media. For twenty-some years after he introduced actual malice as a First Amendment standard (in *New York Times v. Sullivan*), Justice William Brennan remained concerned that the Court might renounce or soften the rule. In October 1988, however, in a conversation with this book's author, an elated Justice Brennan said he believed the *Falwell* ruling had anchored actual malice as a solid doctrine for decades to come.

### ***Shocking News Content and Tactics***

The *Falwell* decision is not the answer to all emotional distress situations, however. Consider this 1991 case from Florida: A six-year-old girl had been abducted in Orlando. About two years later a construction worker in nearby Oviedo discovered a sundress and a child's skull, which were taken into possession by the Oviedo police. When it was determined that the remains were those of the abducted girl, her family was notified and a memorial service planned. On the day of the service, a local TV news reporter drove to the Oviedo Police Department and asked to see the girl's skull. The police chief complied, and the reporter made a close-up videotape of the skull as it was removed from a box. The video was aired throughout central Florida on the six o'clock news in conjunction with coverage of the memorial service. Among the audience was the unsuspecting family of the girl, and the emotional impact of the tape was devastating. The abducted girl's twelve-year-old sister reportedly fled from the room screaming "That's not my sister."

Family members sued the station for the tort of outrage. The Florida Court of Appeal refused to dismiss the claim. The court wrote: "We have no difficulty in

concluding that reasonable persons in the community could find that the alleged conduct of Channel Two was outrageous in character and exceeded the bounds of decency so as to be intolerable in a civilized community. . . . Indeed, if the facts as alleged herein do not constitute the tort of outrage, then there is no such tort.”<sup>57</sup> The court did not employ the *Falwell* standard or any other special First Amendment protection. In fact, this case demonstrates the narrow applicability of *Falwell*.

Infliction of emotional distress might also occur during news *gathering*, without publication or broadcast, as a 1995 California case illustrates. A mother had murdered her two young children at home and then committed suicide. Meanwhile, three young playmates of the murdered children, girls aged five, seven, and eleven, were at home next door, unaware of the violent tragedy. A TV reporter and camera operator covering the story came to the front door and the three girls answered. With the camera rolling in the doorway, the reporter questioned the girls and established that no adults were home, that the girls knew the children next door, thought they were nice, and played with them “all the time,” and that the girls had no idea what had happened. At that point the reporter stated, “Well, the mom has killed the two little kids and herself.” One of the girls exclaimed, “Oh, my God!” The reporter asked a few more questions and then terminated the interview; no portion of the interview was broadcast.

The girls sued for intentional infliction of emotional distress, and the California Court of Appeal refused to order summary judgment for the TV station. The station argued that the interview, as revealed in the resulting videotape, was not conducted in an offensive or threatening manner. The reporter did not provide details about the deaths, and he apparently spoke in a tone of voice appropriate to young children. But the court said a jury could nevertheless conclude that the elements of intentional infliction were present: “A jury could find that a television reporter who attempts deliberately to manipulate the emotions of young children for some perceived journalistic advantage has engaged in conduct ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.’”<sup>58</sup>

## TRESPASS

The tort of trespass is an unauthorized entry onto someone else’s real estate, be it house, apartment, office, barn, or acreage. Trespass is discussed in more detail in Chapter 6. But it’s noted here because trespass is often alleged along with intrusion when photographers enter private property to film arrests, stalk celebrities, or pursue an undercover story.

Intrusion may occur without a trespass upon the plaintiff’s property. An example might be hiding a camera in a park restroom. And the contrary is true as well. A trespasser in a private orchard is not likely guilty of intrusion upon someone’s

seclusion. But in many privacy lawsuits, both of these torts are alleged, and between them, trespass is usually the easier claim for a plaintiff to win. On the other hand, compensatory damages for trespass in many states may be comparatively low.

## CRIMINAL STATUTES

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In addition to the four privacy torts and some companion civil laws, various state and federal criminal statutes also work to protect privacy from invasion by the mass media. These laws designate as misdemeanors certain methods of information gathering or certain disclosures of information. In some cases the criminal statutes also authorize civil lawsuits by the injured individuals.

### PHOTO STALKING

Public sentiment against **paparazzi**—photographers who aggressively stalk and photograph celebrities for profit—erupted following the 1997 death of Diana, Princess of Wales. The princess died tragically in a Paris car crash, some said because her driver was attempting to elude paparazzi who were chasing the car on motorcycles.

Though a variety of state laws are already on the books to combat the dangerous pursuit of others—laws against intrusion, harassment, stalking, battery, reckless driving—federal lawmakers in the late 1990s introduced bills intended specifically to restrict photographers. The bills would have made it a federal crime to pursue someone in a way that risks bodily harm in an effort to photograph or tape the person for commercial purposes.<sup>59</sup> None of these proposed federal criminal laws against paparazzi was actually enacted. California did pass a civil statute, however, declaring it an invasion of privacy to attempt to capture “in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaged in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy.”<sup>60</sup> Violators are liable for up to three times the amount of actual damages.

### BETRAYING IDENTITY

Media codes of ethics and the policies of individual media commonly declare that individuals’ identities should be kept confidential in some circumstances to avoid undue embarrassment or hardship and to avoid bad social consequences that might be sparked by disclosure. Rape victims and juveniles involved in criminal proceedings are frequently among those for whom confidentiality is urged.

But in some cases states have attempted to mandate confidentiality with criminal statutes, and that raises a conflict with basic First Amendment principles. As we saw in Chapter 2, once the media or other third parties have obtained

information, it's a rare instance when the government may step in to prohibit and punish publication categorically. This point is illustrated by a U.S. Supreme Court case from 1979, *Smith v. Daily Mail Publishing Co.*<sup>61</sup> At issue was the constitutionality of a West Virginia law that made it a crime for newspapers to publish the names of juveniles who were the subject of juvenile court proceedings. There had been a killing at a junior high school, and reporters at the scene learned the suspect's name by asking witnesses and police. The newspapers published the name and were indicted.

The Supreme Court ruled in favor of the newspapers, holding that the state's method of protecting confidentiality in juvenile proceedings was unconstitutional. The state's interest in protecting juveniles and fostering their rehabilitation was important, the Court agreed, but not important enough to prevail over the newspapers' First Amendment rights. Several Supreme Court opinions have fallen into this same mold, striking down laws and lower court orders that attempted to protect confidentiality by prohibiting third-party disclosure. (Note the similarities with *Cox Broadcasting Corp. v. Cohn* and *Florida Star v. BJF*, the civil cases discussed earlier.) At the end of its *Smith* opinion, however, the Court included a warning of sorts. Describing its holding as a narrow one, the Court specifically reserved judgment on how the balance might be struck in cases where the media obtain information illegally or where the privacy issues are more compelling. Despite this caveat, any law that categorically prohibits the media from publishing truthful information is presumptively unconstitutional if the law's sole purpose is to protect individual privacy.

It is quite a different matter when statutes prohibit government employees or the actual participants in government proceedings from relaying information to the media and other outsiders. Although government rarely may stop the media from disclosing what they know, it usually is constitutional for lawmakers to prevent media and the public from obtaining information in the first place. Therefore, many statutes take this tack, some of them purely in the interest of protecting personal privacy. They deem various kinds of individual-specific information confidential and then set penalties for government employees who release that information to the public or media. Florida, for example, is among the more restrictive states. It classifies more than fifty kinds of information as confidential, including abortion records, motor vehicle accident reports filed by the people involved, birth records, and the cause-of-death sections of all death records.

## RECORDING AND INTERCEPTING CALLS

As eavesdropping and audiotaping devices became more sophisticated, convenient, and available, great concern arose over the sanctity of private conversations. The federal government and the states enacted so-called wiretap statutes, many of them in the 1960s, that made it a crime to intercept private conversations

electronically. The statutes carved out certain exceptions, such as legitimate law enforcement investigations.

At the federal level, a series of high-profile criminal cases involving surveillance of U.S. citizens without a warrant spurred Congress to pass the Federal Wiretap Act of 1968. It was later amended by the **Electronic Communications Privacy Act** of 1986, an extensive package of legislation.<sup>62</sup> Among other things, the act makes it a crime for any person willfully to intercept or record another's oral or wire communications through the use of an electronic or mechanical device. Violators are subject to fines and imprisonment and also are liable for civil damages. But interception or recording is privileged under the statute when done by a party to the conversation or when one of the parties to the conversation has given prior consent.

In a 1990 case a New York physician with a national reputation for his controversial diet program sued the producer of a nationally syndicated news show, *Inside Edition*, claiming that the defendant violated the Federal Wiretap Act. One of the producers had infiltrated the doctor's office by posing as a patient and had surreptitiously videotaped the doctor during alleged medical malpractice. The physician managed to obtain a temporary restraining order prohibiting the producer from broadcasting the videotape. The Court of Appeals promptly reversed, however. Although the wiretap law prohibits certain conduct, the court held, it doesn't authorize a prior restraint of the press in its exercise of First Amendment rights, even if the media's conduct clearly violates the statute. The remedy is to sue or prosecute after the fact.<sup>63</sup>

Of particular importance to communicators, because it concerns a relatively common practice, is how the various state laws treat audiotaping of telephone conversations. The state wiretap laws are of two general types. Some states, led by Florida<sup>64</sup> and California<sup>65</sup> are more restrictive than the federal law. In these states even participants in a phone conversation may not tape-record the conversation without the consent of *all other parties* involved. Other states, such as Texas,<sup>66</sup> mirror the federal model and allow taping as long as at least one participant agrees. In other words, participant taping would always be permissible in these more lenient states, but secret taping by a nonparty to the conversation would not.

California also has a specific statute regarding interception of *cellular* telephone communications. Irrespective of whether the conversation is regarded as private, intercepting a cellular call is punishable by a fine up to \$2,500 or a year in jail or both.<sup>67</sup>

The Federal Communications Commission has a specific rule on recording telephone conversations for purposes of broadcast, and the rule requires the consent of all parties to the conversation. Violation of the rule can result in a penalty being levied against the broadcast license holder. The FCC rule reads:

Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party

to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.<sup>68</sup>

Suppose a mass medium obtained possession of a taped conversation that it knew had been surreptitiously and illegally recorded by someone else. Could the government prohibit the medium from airing that conversation? A couple of Supreme Court cases noted earlier in this chapter, *Florida Star v. BJF* and *Smith v. Daily Mail Publishing Co.*, would suggest the answer is no, at least where the taped conversation is newsworthy.

The Court addressed the question directly in the 2001 case of *Bartnicki v. Vopper*. During a period of contentious negotiations between a teachers' union and a local school board in Pennsylvania, an unidentified person intercepted and recorded a cell phone conversation between the union's negotiator and its president. At one point the president said, "If they're not gonna move for three percent, we're gonna have to go to their homes . . . to blow off their front porches. . . ." The tape found its way to a radio commentator, who aired it on his public affairs show. Then another station aired the tape, and newspapers published transcripts. The two union representatives sued the media for damages, claiming they knew or should have known the conversation was illegally taped by a third party. The basis for the lawsuit was a provision in the Federal Wiretap Act that declares it illegal for any person to disclose the contents of any conversation knowing that the information was obtained through the unauthorized interception of a wire or electronic communication.<sup>69</sup>

The Supreme Court held that application of the wiretap law to the media in this scenario violates the First Amendment. The Court assumed that government could prohibit the initial, intrusive interception. But it was quite a different matter, the Court said, to punish a medium for relaying the information when the medium acquired the tape legally and was not involved in the initial, illegal conduct, and where the information was of legitimate public concern. "In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance," Justice Stevens wrote for the 6–3 majority. "[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."<sup>70</sup> The Court warned that it was not ruling on whether disclosure of domestic gossip or other information of purely private concern would also have been protected. See Exhibit 5.5 for a list of questions you should ask yourself before employing secret cameras or recording devices.



**EXHIBIT 5.5** *Hidden Cameras: Questions to Ask First*

With the popularity of reality-based TV shows and undercover news segments in recent years, the use of hidden cameras has grown. But the practice can easily run up against complex and roughly defined legal traps. These are some important questions to ask before deciding to venture out with a hidden camera.

- Does your state require *all* parties to a confidential conversation to consent to any taping?
- If yours is a one-party consent state, will you be a participant in any conversations you tape?
- Why, exactly, is it necessary to use a hidden camera? Is it expected to add news value to the story or just a theatrical or ratings boost?
- Have you already attempted to consider all other, more traditional means of getting the story?
- Will you be using deception to gain entry to the taping location?
- Will you be taping in a place that's public, semi-public, or truly private?
- Will the subject of the taping have a reasonable expectation of privacy?
- Do you expect to tape criminal activity? And if so, what will you do if you witness a felony in progress?
- Will your resulting tape disclose embarrassing private facts of little news significance? Or will it concern matters of vital public concern?
- Will the tape be very carefully edited by experienced members of the news department? Who will screen the tape after editing to ensure that it remains a fair and true depiction of events?
- Will this same person screen all promotional spots to ensure their honesty and fairness as well?
- Have your plans been reviewed by legal counsel?

**PRIVACY IN CYBERSPACE**

Computer communications provide unique and alarming opportunities for invasion of personal privacy. Naturally, e-mail, social-networking sites, and personal blogs can be used as convenient tools to invade privacy—by disseminating private facts, for example. Messages in these media often are constructed much more casually and quickly than in formal, hard-copy letters. And cyberspace messages often are disseminated to many contacts without adequate thought, sometimes even by accident (the “Oops, did I press send?” syndrome). The so-called “Web 2.0” tools have proven a tempting vehicle for getting even, too. For example: Young woman breaks up with young man; young man feels hurt, creates a personal blog with a derogatory title, and in the blog details and ridicules young woman’s most intimate moments and private habits.

This section will look at another side of the cyberspace picture: invasions of privacy that might occur by accessing e-mail and other Internet information as it is stored or transmitted. As Internet-based tracking tools, sophisticated databases, networked communications, and online business transactions have become increasingly prevalent, so too have special privacy issues arisen and grown increasingly volatile. Individuals are trying harder to safeguard their personal data,

while media and commercial organizations are pressing harder to access that data. Therefore, special statutes, agency policing, and Internet industry self-regulation are now important additions to the law of privacy.

## E-MAIL AND WEBSITES

One of the unanswered legal questions about cyberspace is the extent to which personal e-mail messages are protected under privacy law. Is it a violation of law for an investigative journalist to access others' e-mail messages? May an employer monitor employees' e-mail?

The relevant law on e-mail privacy comes primarily from three sources. First, the privacy tort known as intrusion may apply if the e-mail user had a reasonable expectation of privacy and that expectation was invaded in a highly offensive manner. Application of the tort to e-mail invasions is uncertain from one case to another, however, because e-mail users will not always have the requisite expectation of privacy. For example, in some workplaces, employees are on notice that e-mail messages are periodically monitored or that copies of all messages are automatically stored by the system administrator. Many seemingly analogous cases have dealt with privacy of telephone communications and have concluded that interception of calls can amount to a tort.<sup>71</sup> But e-mail is in some ways less secure, and less private, than traditional communications by phone or letter. For example, e-mail messages travel through a system server, and some systems automatically create backup copies of all messages as a precaution against system failures. These backup copies may remain available for inspection even after the sender and receiver have erased their copies. Particularly in the workplace, employees will not always have a reasonable expectation of privacy for e-mail messages, and courts have so held.<sup>72</sup>

A second source of relevant law is state criminal statutes that prohibit various forms of electronic surveillance or interception of private communications. The language in these statutes varies greatly, but a number of these would prevent secret employer monitoring of e-mail messages unless all parties to those messages consented. Some employers and e-mail service providers require user agreements that disclose monitoring procedures, thereby avoiding problems with such statutes.

Another source of relevant law is the federal Electronic Communications Privacy Act (ECPA) noted earlier. This is potentially an important source of law to combat e-mail snooping nationwide. Not only does the ECPA include the Wiretap Act that prohibits the interception of an electronic communication without the prior consent of at least *one* of the parties to the communication, but other key provisions in the act prohibit accessing communications that are stored in a computer system without specified authorization (the Stored Communications Act).<sup>73</sup>

A limitation to ECPA protection is illustrated by the case of *Jessup-Morgan v. America Online, Inc.* Terry Jessup began a relationship with her soon-to-be husband, Phillip Morgan, while he was still married to Barbara Smith. While a

divorce was pending between Morgan and Smith, Jessup played a hoax on Smith. Jessup impersonated Smith by posting a message with the name “Barbeedol” to an America Online message board, soliciting “just about any kind of sex I can have with someone other than myself.” The message included the phone number where Smith was living with her parents and children, and disturbing phone calls followed. Smith’s lawyer served AOL with a subpoena seeking the identity of the message sender, and AOL complied. Jessup sued AOL, claiming that its release of her name violated the ECPA and related privacy laws. But a federal court dismissed the case, holding the ECPA was not applicable. The statute prohibits disclosing the contents of an electronic communication to any person, entity, or government. But the term *contents* refers to the substance of the message, the court said, not to the identity of the AOL account customer.<sup>74</sup>

In an ECPA case from 2002, *Konop v. Hawaiian Airlines*, it was access to a secure website that sparked legal action. Konop, a pilot for Hawaiian Airlines, created a website where he posted messages critical of the airline and the pilots’ union. He controlled site access by requiring visitors to log in with user names and passwords. He allowed pilots and other Hawaiian Airlines employees to access the site in this way, but he prohibited management from viewing the site, as stated in the terms and conditions for users. A vice president for the airline was given permission by another pilot to use that pilot’s password to access the site. Konop later learned that management had accessed his site and that the airline’s president took great exception to its contents. Konop sued the airline, alleging violations of the ECPA provision that makes it illegal to access an electronic communications service without authorization and obtain access to content electronically stored. But the statute contains an exception for instances when the outside access was permitted by a “user of that service” with respect to information “intended for that user.” The pilot who lent his password to management was clearly *allowed* to use the site, but under the plain language of the statute, the federal appeals court said, his permission to management would be valid only if he was an *actual user* of the site. The case was sent back to the trial court to make that determination.<sup>75</sup> The situation in this case is similar to a problem presented in the chapter Hypothetical.

## COLLECTING AND ACCESSING DATA

The past decade has seen increasing concern over the collection of data about individuals, without their knowledge, as they navigate the Internet. As people visit websites they leave electronic markers, and sometimes other information, at each visited page. The trail of these markers, sometimes called the clickstream, may reveal such information as the visitor’s e-mail address, the type of computer used, and the URL pathway by which the visitor arrived at a particular web page. Increasingly sophisticated software, often called **spyware**, makes it possible to

track website visits and to accumulate such data as the length of time spent on each page and the number of return visits generated by a page. Spyware programs are downloaded unknowingly by computer users as they visit certain commercial sites.

Many Internet users do not understand the degree to which the information they voluntarily provide or involuntarily leave behind can be accumulated and sold for commercial purposes—a practice called online profiling. When they do realize it, they often feel their privacy is being invaded. Even when individuals have voluntarily provided information at a particular website, they may be angered to find that it is being made available to other commercial interests in quite different contexts. A special concern has been the collection of product preference information and other data from children.

One answer to the problem is more technology. Recognizing consumer anxiety over web privacy, many software companies and other organizations have been devising systems to protect anonymity, ensure transmission security, and prevent children from utilizing sites, and some even rate websites on the degree of privacy they guarantee.

Internet-specific government regulation has also begun. Such government agencies as the Federal Communications Commission and the Federal Trade Commission have been examining web privacy issues for some years. In 1997 the FTC urged the online industry to adopt website policies that fully inform users of a site's privacy practices for various kinds of information, provide users with choices on how information is used, and allow consumers access to the information that has been collected about them. And today the FTC actively enforces those privacy policies that online service providers promote to their users. If a policy promises or implies a certain degree of privacy that in actuality is not provided, the agency deems it an illegally deceptive commercial practice.

In 1999 Congress enacted the Children's Online Privacy Protection Act (COPPA),<sup>76</sup> which specifies the circumstances under which online businesses can collect or use data from children under thirteen. Under COPPA, operators of commercial websites aimed at children must provide online notices of their information practices, indicating in clear language the kinds of information collected, how it is used, and whether it is disclosed to third parties. Also, before collecting any personal information from a child, the site operator must obtain verifiable parental consent. If a website does not first obtain parental consent, it cannot set information-gathering "cookies" on a child's computer, for example, or ask questions about toy and game preferences.

Government has also become concerned about the increased use of spyware in general. After studying the issue, the Federal Trade Commission in 2004 concluded that spyware indeed poses a threat to legitimate privacy rights of e-commerce consumers. As of 2009 at least half the states had passed or considered anti-spyware legislation, several spyware-combating bills had been

introduced in Congress, and the FTC has fought overly aggressive spyware use by filing cases for deceptive commercial practices. The first state to enact an anti-spyware law was Utah. Its Spyware Control Act, as revised in 2005, requires advertising companies to determine whether a computer user is a Utah resident, and if so, the law prohibits remote installation of spyware that would analyze website visits and trigger pop-up advertising. But a significant limitation with such laws is that much of the offending software originates from outside the country, raising difficult jurisdiction issues and making legal enforcement cumbersome or impossible.

Seeking to fend off further government regulation and promote best practices for a growing industry, several Internet trade organizations have adopted self-regulatory guidelines for their members. For example, the Interactive Advertising Bureau, composed of hundreds of media and technology companies who sell online advertising, in 2008 adopted a list of “privacy principles.” One of those principles is that consumers visiting any website should be provided “meaningful notice” of the types of individual data collected for commercial purposes. Additional legal aspects of online advertising and so-called “e-havioral tracking” are discussed in Chapter 12.

### ***Hacking, Snooping, and the Famous***

As we have seen, a number of specialized statutes, over and above the privacy torts, are aimed at protecting the integrity of personal communications and records. When newsmakers are involved, however, there can be a compulsive temptation to snoop. The presidential campaign of 2008 provided a number of examples.

In September of that year, for instance, the McCain-Palin campaign wrote an urgent letter to the TV networks that read, “Today McCain-Palin 2008 learned that the personal Yahoo.com email accounts of Gov. Sarah Palin, her family, and her staff were hacked, in violation of various federal and state criminal laws, including the Electronic Communications Privacy Act.... We write to formally request that you, as leaders of responsible news organizations, take no steps to aid or abet, or exacerbate the damage caused by the hacker or hackers’ violations of law and privacy rights. You should not in any way reveal the contents of any of these hacked email accounts.”

Similarly, shortly after the election news media reported that employees of Verizon Wireless had accessed the cell phone records of President-elect Barack Obama. This was against company policy and possibly in violation of the Telephone Records and Privacy Protection Act enacted in 2007.<sup>77</sup> The employees reportedly were disciplined and the contents of those records were not made public.

As a general rule, in situations such as these the applicable privacy-protection statutes make no exceptions for accessing information relating to newsworthy individuals. So while the First Amendment is likely to protect the media when they innocently receive and then publish newsworthy information, media

professionals should obtain legal counsel before actively participating in any steps to secure personal records of noteworthy people. This is especially true today, with a panoply of relatively new privacy statutes on the books, and likely more on the way.

## Summary Points

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**Privacy protection**, unlike defamation, is a relatively young area of law that reflects modern society's changes in attitudes, lifestyles, and technology.

**A majority of states has recognized** four separate torts that come under the invasion of privacy rubric: appropriation, disclosure of private facts, false light, and intrusion. In addition, the overlapping tort of intentional infliction of mental distress has been claimed against the mass media with increasing frequency in recent years.

**So far these torts** have been kept under control by a few rulings from the U.S. Supreme Court and by narrow application in the lower courts.

**Some criminal statutes** are also on the books to protect privacy. In most cases, they are concerned with the secret use of electronic eavesdropping devices.

**As some general legal guidelines**, remember that:

Scenes open to public view can be photographed, and information in public records may be reported, without consent.

Private information about an individual, once you have it, may always be published or broadcast if a legitimate news purpose exists.

In areas specifically intended for privacy, such as private homes and motel rooms, you may not secretly snoop, tape-record, or photograph, even if a newsworthy motive exists.

Written consent must be obtained before using a person's name or picture in a commercial message.

People should not be represented in a misleading and highly objectionable context without consent.

**In recent years plaintiffs have increasingly alleged** intentional infliction of emotional distress against media defendants. Although the claim is probably viable in some circumstances, the Supreme Court has limited this tort by ruling that public figures, at least, must show that the highly offensive communication alleged facts and was disseminated with actual malice.

**The Internet raises special privacy concerns.** In particular, legislation and court decisions are wrestling with the question of when it is a legal violation to access personal e-mail, access secure websites, and collect consumer data without consent.

**The Hypothetical at the beginning of this chapter** presented numerous potential privacy problems. From a legal perspective, some things would clearly be safe to report, such as Grundy's drunk driving arrest, discovered in public police logs. On the other hand, broadcasting much of the additional material, such as videotape from the hot tub, could pose a realistic danger of a lawsuit for disclosure of private facts. The outcome of such a lawsuit would depend on details relating to the degree of privacy at issue and the connection to legitimate news. Disclosing the psychiatric treatment, for example, could lead to liability if not related to a matter of legitimate public concern. Another privacy tort, intrusion, might also have been committed when you climbed into the tree and used a powerful camera lens. Again, an examination of more detailed facts would be needed to determine whether Grundy had a reasonable expectation of privacy in her backyard.

## Discussion Questions

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1. Should wrongful intent or news-gathering methods by defendants have any bearing on the outcome of privacy lawsuits? For example, suppose a trespassing news reporter slipped unnoticed into a physician's office, stole an individual's medical file, and then published information from the file—including the fact that the individual was infected with HIV. If the medical information was legitimately newsworthy, would the reporter's wrongful methods be the slightest bit relevant in a lawsuit brought by the individual subject of the story? Has the Supreme Court answered this question, or has it left the door open to such a lawsuit?
2. For purposes of the appropriation tort, the trick sometimes is determining whether the individual's name or likeness was used for a commercial purpose. How would you categorize the following unauthorized uses: (a) Putting an employee's picture on the front of the company's monthly employee newsletter? (b) Using a business customer's picture on the cover of the company's shareholder magazine? (c) Using a campaign contributor's name in a political ad urging support for a senatorial candidate? (d) Using an individual doctor's picture on a flyer for a cancer society fundraising event? (e) Using a college professor's picture in a calendar being sold on campus to raise funds for a fraternity?
3. It has been rare for plaintiffs actually to win lawsuits against mass communicators for invasion of privacy or infliction of emotional distress. Yet it appears these kinds of lawsuits are being filed with increasing frequency. How would you explain this? Have these lawsuits become more frequent because of changing tactics by the media? A changing mood among media consumers? An increasingly litigious society?

## Key Terms

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appropriation	misappropriation
commercial use	model release
Electronic Communications	name or likeness
Privacy Act	newsworthiness defense
false light	outrage
fraud	paparazzi
harassment	photo consent form
intentional infliction of emotional	private facts
distress	public record privilege
intrusion	right of publicity
knowing consent	spyware



# Access to Places and Information



*After completing this chapter, you should*

- **Recognize** the limited role of the U.S. Constitution in media access problems.
- **Understand** the basic rules of trespass law.
- **Understand** the typical framework of statutes that grant rights of access to government meetings and records.
- **Know** the most common exceptions to state and federal access laws.

## ACCESS TO PLACES

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Sometimes the threshold question for media professionals is whether they may gain access to newsworthy places—the house where suspected terrorists were arrested, the scene of a traffic accident, a military testing site, or the private industrial yard where toxins are being dumped illegally. Chapter 5 discussed the narrow tort of intrusion, which in the interest of personal privacy prohibits the media from snooping in certain places or by certain methods. This chapter considers the much broader, more commonplace situations in which laws affect access. The discussion includes laws that limit access as well as laws that help open the doors.

## Hypothetical

### Get Lost and Keep Out

Assume that you are working as a staff writer for a consumer affairs magazine, and the editor has assigned you to cover a story about contaminated drinking water in a Midwestern town. Some physicians suspect that a recent marked increase in leukemia cases is linked to the water. One of the first things you do after arriving in town is visit city hall and ask to see a copy of a special water quality report completed just a few days ago by the city's department of health. The clerk at the front desk asks, "Why do you want to see it?" You tell her you're working on a magazine story about the city's bad water and the corruption that may be behind it. The clerk says, "Sorry, that report is being kept confidential because it's highly technical. It would be too confusing to media people and the public."

Later that evening you show up at the weekly city council meeting, during which local residents are expected to speak out against the city's water policies. However, a guard stops you at the door to the council chambers. "You with the media?" he asks. You nod, and the guard says, "No media allowed."

You're getting frustrated now, and you decide to do some investigating first-hand. The next morning you drive to the edge of town and begin hiking across a field in the direction of the city's water wells. After about half a mile you encounter a red sign reading, "Warning—Private Property. No Trespassing." About fifty yards ahead you can see ponds of brackish water on the private industrial property. An odor fouds the air, and lots of rusty metal barrels are scattered around. You figure what lies ahead is a dump site for toxic wastes. You disregard the sign, approach the ponds, and take dozens of photographs of the sickening mess. Just then, two men wearing gas masks emerge from behind a pile of canisters. One of them says to you, "This is private property and you're trespassing. Hand over all your film, or you'll get in trouble with the police." Instead, you turn and run as fast as you can. As you're racing back through the field, you wonder about the legality of your actions.

Would the law help you gain access to the city's water report and to the council meeting? Who holds the upper hand, legally, in the confrontation at the dump site?

The first thing to realize is that the First Amendment is usually impotent in confrontations over access. With limited exceptions, the First Amendment is not interpreted to guarantee public or media access, either to places or to information. As Chief Justice Warren Burger wrote in 1978: "There is an undoubted right to gather news 'from any source by means within the law,' . . . but that affords no basis for the claim that the First Amendment compels others—private persons or governments—to supply information."<sup>1</sup> In other words, the First Amendment works defensively as a shield against government suppression, but not offensively

as a battering ram to open doors to the news-gathering process. It does not, for example, make communicators immune to the law of trespass.

## TRESPASS ON PRIVATE PROPERTY

**Trespass** may be defined as the intentional, unauthorized entry upon property that is rightfully possessed by others. As the definition suggests, the elements of this common tort are relatively simple. All that is required is that a person physically invade land or structures without the consent of those who lawfully control the property. Typically the tort occurs when newspaper photographers, TV camera crews, or news reporters wander onto private property in hot pursuit of a story.

### ***Consent: Express or Implied***

Consent is a complete defense to trespass. It may be **express consent**, if you are invited or granted specific authorization to enter property. But that is not the only kind of consent recognized by law. People enter private property routinely—to shop, eat at a restaurant, or knock on a front door, for example—without specific authorization and without becoming liable for trespass. That’s because most of those entries follow general custom or a pattern of usage, and under the law there is **implied consent** to follow the custom.

Trespass may occur at the moment of entry, such as when a reporter hops a fence. Or, if a visitor originally had either express or implied consent, the trespass could occur later—when the visitor exceeds the scope of consent or when consent is revoked and the visitor fails to leave. For example, suppose you entered a restaurant during its regular business hours. No trespass has occurred because, under the legal doctrine of **custom and usage**, there is implied consent for the public to enter. But the implied consent would not extend to all activities, such as roaming through the restaurant to photograph patrons. Furthermore, the restaurant manager could end any claim of implied consent by simply asking you to leave. If you linger, trespass will occur. In other words, the initially lawful entry has lapsed.

A New York case involved a CBS camera crew that had been directed to visit restaurants cited for health code violations and to enter unannounced, “with cameras rolling.” The crew entered the plaintiff’s restaurant and, it was claimed, immediately began filming the patrons in a noisy and obtrusive fashion. Patrons waiting to be seated instead decided to leave the restaurant, and the manager had to push the crew from the premises. A jury found CBS liable for trespass, and an appellate court upheld the verdict. The trespass occurred when the crew first entered the restaurant, the court noted, because the crew had no intention of entering the establishment for any of its customary purposes.<sup>2</sup>

What if the entry is for a customary or approved purpose, but there is another, undisclosed and unapproved purpose as well? Is the consent still valid? This

thorny legal question often arises in cases where videotaping was done secretly by undercover reporters whose presence was otherwise welcome. Unfortunately, courts across the country have not been consistent in dealing with these cases. Some have stood by the general rule that consent to enter property can be legally valid even if obtained by misrepresentation or concealed intentions.<sup>3</sup> But other courts have sided with plaintiffs who allege that covert taping by guests can turn them into trespassers.

For example, a Minnesota television reporter applied for a volunteer position with a local religious organization that operated care facilities for the mentally retarded. She did not disclose that she was actually a reporter and, during 120 hours as a volunteer at various facilities, she secretly videotaped what she observed. The TV station broadcast a report using portions of the video that allegedly showed improper care by the staff. The Court of Appeals of Minnesota in 1998 ruled that although the reporter's volunteer work was welcomed initially, "if she exceeded the scope of her consent by secretly videotaping their activities, her continued presence became unpermitted and unlawful."<sup>4</sup>

### ***Tagging Along with Police***

News photographers and reporters have run into legal trouble by assuming that the right of police or other emergency personnel to enter property also implies consent for the news media to follow. Courts usually reject this contention. In fact, even the express consent of police or fire officials may be insufficient.

The often cited 1986 ruling in *Miller v. National Broadcasting Co.* serves to illustrate: As you may recall from Chapter 5, a television crew working on a mini-documentary about paramedics obtained consent to accompany a unit of Los Angeles Fire Department paramedics and film all aspects of their work. The unit was called to a private residence, and the camera crew followed—right into the bedroom where a man lay on the floor dying of a heart attack. The TV crew stayed to film the resuscitation efforts, but never sought consent to enter from the one person who, under the circumstances, could give it. That person was the victim's wife, who anxiously waited in another room of the apartment and realized only later that a television crew had been present. The California Court of Appeal held that she could pursue a trespass claim, as well as the claim for invasion of privacy, against the TV station.<sup>5</sup> The Florida Supreme Court reached a different verdict ten years earlier, holding that no trespass occurred when a newspaper photographer accompanied fire officials into a burned-out house without the owner's consent.<sup>6</sup> But the case may be factually distinguishable because the owners of the house were out of town at the time and the authorities in this situation could be viewed as the temporary custodians of the property, legally able to authorize others' presence. Whether other courts would follow this reasoning is uncertain, however.

What is certain is that tagging along with authorities, which has become increasingly popular in television, is legally risky on private property. Various torts

can grow out of this practice and, from the plaintiff's standpoint, the easiest claim is usually trespass. Sometimes for the media it is a calculated risk. The subject of a police narcotics raid is likely to have other, more pressing concerns than to pursue a trespass claim against the media. Furthermore, trespass damages are often minor, a point discussed in the next section. Still, media people should approach the tag-along scenario with caution.

A pair of U.S. Supreme Court cases decided on the same day in 1999 has restricted the tag-along opportunities for media. In *Wilson v. Layne*<sup>7</sup> and *Hanlon v. Berger*<sup>8</sup> the Court held that, in addition to the media violating trespass law, police may violate the Fourth Amendment of the Constitution by allowing the media to accompany them into private residences. The Fourth Amendment prohibits unreasonable government searches and generally confines searches to what is stipulated in judge-approved warrants.

In *Wilson*, a team of federal and Maryland law enforcement officers invited a *Washington Post* reporter and photographer to tag along in the early morning as the team executed a search warrant at a private home. The team expected to find a dangerous fugitive inside, but instead found only his parents, Charles and Geraldine Wilson, dressed in their nightclothes. Mr. Wilson angrily confronted the officers and was then subdued on the floor, all while the *Post* photographer took numerous pictures.

In *Hanlon*, agents of the U.S. Fish and Wildlife Service searched the Montana ranch house of Paul and Emma Berger, where the agents sought evidence that Mr. Berger had killed protected eagles. But when the USFWS agents arrived with a search warrant, they also brought along a crew of photographers and reporters from Cable News Network (CNN). In accordance with a special access agreement between CNN and the USFWS, the cable channel collected eight hours of audio and videotape at the ranch, unbeknownst to the Bergers. One USFWS agent even wore a hidden microphone that continuously transmitted audio to the CNN technical crew.

The residents in each case sued the law enforcement officers, contending that they violated the plaintiffs' Fourth Amendment rights by expanding a government search into a media production. The Supreme Court agreed. "We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant," the Court said in *Wilson*. The "possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home."

In the *Hanlon* case, the ranch owners also sued CNN for trespass. The federal Court of Appeals held that the government agents' temporary control of the Berger ranch during the search did not authorize the agents to invite media onto the property. Therefore, CNN could indeed be liable for the tort.<sup>9</sup>

**QUICK****CHECK****Trespass**

1. Has there been an intentional or negligent entry upon the property of another?
2. Was the entry without consent—either express or implied?
3. Or, if consent was originally present, did the visitor exceed the scope of consent or fail to leave when consent was revoked?

Thus, court decisions in the *Wilson* and *Berger* cases have dealt a multipronged blow to the decades-old practice of media ride-alongs with police—a practice increasingly popular in recent years as the public appetite has grown for televised scenes of dramatic, in-the-trenches engagement between police and crime suspects. When those scenes are on suspects' private property, and especially in the home, both law enforcement and the media must consider the risks of continued media presence.

**Contractual Limits on Access**

Remember that even when communicators are welcomed upon privately controlled property, the consent does not necessarily extend to the full range of news-gathering activities. In fact, consent to enter is sometimes expressly contingent on the entrant's refraining from certain activities—typically photography and taping. Ignoring these restrictions could create a trespass situation.

This is often the case when the media cover privately sponsored entertainment and sporting events. For example, you may find on the back of your ticket to an ice skating exhibition the printed stipulation "No photographing of this performance is allowed." It may be that the sponsor wants to prevent distractions to other patrons. Or perhaps the intent is to maximize marketing opportunities: The promoters may wish to offer exclusive photography rights to a particular magazine. In any event, the sponsors of such events are essentially selling a product, and they may package and sell it in almost any way they wish. The fact that the event may also be newsworthy does not change the rules of proprietary control. When you accept admission to such an event, you have agreed implicitly to the stated restrictions; they become part of a binding contract between you and the proprietor. Generally speaking, you can assume that advance permission is required before you may commercially photograph stage productions or sporting events to which attendance is controlled.

**Damages**

Often in trespass situations there is no damage—no fences broken, no merchandise taken, no flowers trampled. In such cases a lawsuit for trespass rarely looms as an ominous threat. When plaintiffs in trespass cases are unable to show they

were actually harmed, courts traditionally have awarded **nominal damages** to the plaintiff—usually one dollar. These nominal awards are supposed to vindicate the plaintiff in theory, while declining to enrich the uninjured property owner.

On the other hand, whenever some damages can be proved, trespass is a particularly threatening kind of tort for the mass media. This is because *all* harm traceable to the trespass is subject to compensation—injury to the land, to personal property, even to peace of mind.

### ***Criminal Trespass***

Plaintiffs need not show that defendants entered their property with any mischievous or malicious intent in order to win a civil trespass case. If a trespass is “willful,” though, it can sometimes constitute a crime as well as a tort. State statutes specify a variety of criminal trespass situations, such as refusing to leave clearly posted or fenced lands after being asked to do so. In general, trespass rises to the level of a crime when the trespasser acts in defiance of the landowner’s clear wishes. In the Hypothetical scenario that began this chapter, for example, you defied the landowner’s clear wishes by hiking past the No Trespassing sign. In many states, that would amount to a misdemeanor.

The **criminal trespass** statutes vary widely from state to state, though in all cases the crimes pertain to a narrower class of activity than do the laws of civil trespass. The statutes typically specify that for the trespass to be punishable as a criminal offense, a particular intent, such as willfulness or malice, must have been present. And trespasses are especially likely to become criminal if they involve the use of force or some other breach of the peace. As an example, the criminal trespass statute of California reads in part as follows:

Every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor: . . . (m) Driving any vehicle . . . upon real property belonging to or lawfully occupied by another and known not to be open to the general public, without the consent of the owner, his agent, or the person in lawful possession. (n) Refusing or failing to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by . . . the owner, his agent, or the person in lawful possession. . . .<sup>10</sup>

Can you envision situations in which the media might violate criminal trespass provisions such as these? In Oklahoma, news reporters were convicted of criminal trespass after they followed demonstrators into the fenced construction site of a nuclear power plant. The utility had warned reporters in advance that they would be arrested along with the demonstrators.<sup>11</sup>

### ***Special Problem: Confiscation of Media Property***

In the chapter Hypothetical, what are your rights when landowners or their employees attempt to confiscate your film? Admittedly, you are trespassing.

The landowner could sue you for damages, and you might even be guilty of a misdemeanor.

Are you legally bound to comply when they say, “Hand over your film”? Does the act of trespass somehow give others an instant right to your possessions? No. The mere act of trespass does not give the property occupant authority to seize your film, notes, or equipment, though this is often presumed. The legal remedy for trespass is through the courts. Confiscation of your film by force or threat would in turn be a violation of your property rights.

One warning about this, however: The rule can be different if your actions could amount to a crime and police are seizing your film or other property as evidence. Chapter 7 will say more about that.

## ACCIDENT, CRIME, AND DISASTER SCENES

Even in the most public of places, police or other authorities may sometimes close areas in the interest of public safety or an investigation. Typical examples are traffic collisions, chemical spills, scenes of violent crime, or areas damaged by earthquake, storm, or fire. Unauthorized people who enter these enclosed sites may be arrested and prosecuted for misdemeanors.

Of course, it is just such newsworthy areas to which journalists and photographers often want access. Fortunately, newspeople are granted access rather routinely. Some law enforcement agencies issue standing press passes to employed newspeople—something reporters and photographers should inquire about before a newsworthy calamity strikes. A **press pass** is a card, usually, that is a quick form of news media ID for the agency that lets credentialed newspeople past the barricades. But in most cases this practice, which newspeople may come to take for granted, is not required by law. So even with a pass, the media might be held behind the lines with the general public.

In California a unique statute specifically allows newspeople to cross police lines, thus formalizing the common practice legally.<sup>12</sup> But even that statute is interpreted narrowly. A court in 1986 said the statute was meant to allow newspeople to assume the risk of injury and enter sites that were closed solely for public safety. But if authorities believe media access will impede emergency operations, or if the closure is related to investigation of a crime, no media privilege exists. For example, the California court upheld the conviction of a TV news cameraman who disobeyed police orders and entered an airline crash site where officers were investigating a cause that could have been criminal.<sup>13</sup>

If authorities at a calamity scene do order you to stay away, don't expect an on-the-spot argument to prove fruitful. In fact, if you force a confrontation, you could be arrested and prosecuted for interfering with a police officer, even if your presence was consistent with prevailing policy. Courts are likely to defer to the judgment of police officers in emergency situations.<sup>14</sup> If you believe an officer is unreasonably or even illegally standing in the way of your doing your job, ask



to speak to a superior officer, or avoid the impeding individual and find another vantage point. File a complaint later. For the benefit of your long-term working relationship, editors at your organization may want to set up a media/law enforcement meeting at which both sides can discuss problems and agree to some guidelines in areas where state law does not specify your rights.

## POLLING PLACES

Suppose your state passed a statute that prohibits the conduct of any public opinion poll within 300 feet of a polling place on election day. One purpose of the law is to protect the integrity of polling places. Another is to eliminate the early broadcasting of projections based on exit polls, in the belief that early projections discourage voter turnout. Indeed, the 300-foot buffer would make it virtually impossible for the media to conduct valid exit polls. Would this law be constitutional?

Just such a law was passed by the state of Washington in 1983. Several news organizations challenged the restriction on First Amendment grounds, claiming that it effectively eliminated a legal form of expression—accurate exit polling information. The federal Court of Appeals agreed. The court held the law was a restriction on speech, not merely on access to polling places or sources, because it drastically limited communication opportunities between voters and pollsters and prevented the dissemination of polling information. Furthermore, it was a content-based restriction, not a time/place/manner restriction, because it aimed to restrict discussion about voters' choices.

As a content restriction on speech, the law could be upheld only if it were narrowly tailored to serve a compelling government interest. But to the extent that the law attempted to prevent disruption at the polling place, the restriction was far broader than necessary; it banned nondisruptive polling as well. And to the extent that the law attempted to protect the integrity of elections and voter participation rates, the court held that the general interest of protecting voters from outside influences was simply not sufficient to justify a restriction on speech.<sup>15</sup> The U.S. Supreme Court has not decided a case relating to exit polling. Presumably, though, restrictions could be drawn narrowly enough to avoid being categorized as content-based limitations on speech.

## GOVERNMENT PROPERTY

Government property—military bases, prisons, power plants, schools, airports, and so on—exist for a public purpose, but that does not mean they must be open to the public or to the media. Entry can be limited to that which serves the property's purpose, and the laws of civil and criminal trespass apply.

An important difference exists, however, between government-controlled property and purely private property. For the most part, owners of private property may invite or exclude whomever they wish. But government, once it does open property or proceedings to the general public, usually may not single out the media or certain members of the media for exclusion. Discriminatory access practices by government are typically struck down on constitutional grounds. Selective access is discussed more fully in the section with that title near the end of this chapter.

### ***Jails and Prisons***

In terms of media access to government facilities, one of the more common points of contention has been access to jails and prisons. The Supreme Court decided such a case, *Houchins v. KQED, Inc.*,<sup>16</sup> in 1978. Following a suicide in a county jail, a San Francisco television station sought access to the jail in order to get the full story and to photograph the facilities. But the sheriff refused to admit the news crew. Soon thereafter the sheriff announced that monthly jail tours would be available, and a KQED reporter went on the first group tour. Important sections of the jail were not included on the tour, however, and tour members were not allowed to bring cameras or tape recorders or to see or talk to inmates. KQED filed a lawsuit, claiming that the denial of more effective access was a violation of its First Amendment rights.

The Supreme Court held that no First Amendment right was applicable. In his majority opinion, Chief Justice Burger acknowledged that conditions in jails and prisons are matters of great public importance and that the media serve an important function as the “eyes and ears of the public.” Nevertheless, he wrote, many other avenues were available for learning about jail conditions, and the First Amendment simply did not provide a right for the public or the media to enter these institutions, with or without cameras, to hunt for information.

Though media access is not a constitutional right, state laws or prison regulations may allow the media to interview inmates. The policies typically are quite limited, however. For example, they may limit the number of interviews an inmate may grant per month, limit interviews only to certain categories of inmates, require prior approval of interview requests, or prohibit cameras and tape recorders.

A federal appeals court has held that there is a First Amendment right of access to witness executions at state prisons. That right is discussed in Chapter 7.

## **GOVERNMENT PROCEEDINGS**

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When the media seek access to government meetings, hearings, and similar proceedings, the law swings more forcefully to the media’s aid. The federal government and all fifty states have enacted open meeting laws that require government

deliberations to be open to the public. Here again, the First Amendment is not interpreted to provide a general right of access, but it is widely agreed that government decision making in a democracy should take place in the open. Thus Congress and the state legislatures have created these access rights by statute. The rights belong to the general public, not just to the media.

If you ever work in the news business, it will be particularly important for you to understand the provisions of your own state's open meeting law. Generally speaking, legal hotlines for the news media receive more inquiries regarding access to meetings than any other area of communications law.

## STATE OPEN MEETING LAWS

State **open meeting laws** vary greatly and can be quite complicated, covering an array of governmental units in the executive and legislative branches at both local and state levels. The statutes make two general requirements: First, the agencies must provide advance public notice of their meetings; second, the agencies must conduct these meetings openly. The laws do allow closed meetings for specified topics of deliberation.

### *To Whom Do the Laws Apply?*

When examining a state's open meeting law, first ascertain which government bodies are subject to the law. Typically the laws apply to the multimember deliberative bodies of local government, such as city councils, county planning commissions, and school boards. The laws also tend to cover multimember agencies of state government, though it is less common for open meeting laws to cover proceedings of the legislatures.

Often it is presumed that the question of which government bodies are covered by an open meeting law is simple and straightforward. In some cases it is. The county planning commission is covered. The state fish and game commission is covered. Nevertheless, the statutes don't always provide definitive answers on this question. How about a volunteer advisory board appointed by the planning commission? How about the student government at a state college or university? Sometimes the courts must be called upon to answer these questions by interpreting the statute.

### *What Is a Meeting?*

For those government entities covered by an open meeting law, the meetings must be open to the public. Naturally, this raises the critical question of what a meeting is. A meeting is generally defined under these laws as a gathering of a quorum of the governmental body, no matter how informal, whenever official business is discussed or voted upon.

Thus a meeting is determined by the number of agency members present (enough to make binding decisions) and the nature of the discussion, not by the

place where discussions occur. If all members of a city council gathered at one member's house for a hot tub party, it would qualify as a meeting, subject to requirements of the open meeting law, if the members discussed matters pending before the council. The theory is that the media and public have a right to witness the government's decision-making process, whatever it may be. Agencies cannot sidestep the open meeting requirements simply by meeting in an unusual place and calling the gathering a "social" or "fact-finding" session. This is not to say that government bodies don't engage in such practices. All too often they do, and all too often these informal arrangements go unchallenged, by the public and by the media.

### ***The Notice Requirement***

In most cases, advance public notice must be given for the times and places of meetings. Otherwise, of course, the guarantee of public meetings could be circumvented easily by officials who prefer to meet without an audience. Furthermore, open meeting laws often require that an agenda for each meeting be available in advance. The law may even prohibit the agency from discussing or acting on topics absent from the posted agenda. The specifics of the notice-and-agenda requirements may take many forms. In California, for example, one of the leading states in open meeting legislation, local government agencies must set, by ordinance or bylaw, the time for their regular meetings. In addition to this standing notice, the local agency must conspicuously post the agenda for each regular meeting at least seventy-two hours in advance. For state agencies, however, the form of notice is different. A written notice of the time, date, and place of a meeting, along with an agenda, must be mailed at least ten days in advance to all who request the information.

The state open meeting laws contain several exceptions to the notice-and-agenda requirements. For example, in emergency situations such as work stoppages or crippling disasters, agencies may be allowed to meet under a reduced notice requirement, or in some cases with no advance public notice.

### ***Permissible Closed Sessions***

Although recognizing the general right of the public to witness government proceedings, state legislatures have also recognized a need for candor and uninhibited debate among public officials. In some situations this candor would tend to be suppressed if the public and media were present. Also, some kinds of information, if discussed in public, could greatly hinder government effectiveness or compromise individual privacy.

Therefore, the open meeting laws authorize closed sessions, sometimes called **executive sessions**, when certain topics are discussed. During closed sessions, only the members of the agency and perhaps the support staff are present. The states vary significantly in the extent to which their courts will recognize implied justifications for closed sessions. In some states exceptions to the open meeting

requirement are broadly construed or freely implied; in others exceptions are very narrowly construed and are limited to express statutory authorization. In any event, state open meeting laws typically identify dozens of exceptions to the public meeting requirement. Some of the most common exceptions are made for the following reasons:

1. To promote candid discussion and avoid embarrassment for public employees, a personnel exception typically allows workers to be employed, dismissed, or evaluated in closed sessions.
2. To avoid compromising an agency's legal positions, a pending litigation exception may allow agencies to confer with their legal counsel regarding lawsuits by or against the agencies.
3. To discuss threats to public facilities or services, a public security exception may permit agencies to meet in closed session with law enforcement officials.
4. To negotiate salaries and benefits for public employee organizations, a labor negotiations exception allows agencies to meet in private with bargaining representatives.
5. To discuss purchase, sale, or lease of property by an agency, a real estate negotiation exception permits agencies to meet in confidence with their negotiators.

Though a governmental body may be authorized to conduct a closed session, it still may be subject to the notice requirement for that meeting. Also, laws may require that agencies prepare written justification for meetings or portions of meetings that are closed to the public. Many times a meeting will begin in public and shift to executive session when a certain topic is raised. If this happens, it may be smart to stick around; just because officials have gone into executive session doesn't mean they won't come out of it ten minutes later.

### ***What to Do If You Are Shut Out***

If you find yourself shut out of a government meeting or learn that you will be, don't just presume the agency has legal authority to do so. First contact the agency or its attorney and ask for justification. If you then believe the meeting is being closed unlawfully, follow the complaint procedure recommended by your organization, if one exists, and promptly contact your editor or supervisor. Your organization may want to consult its lawyer. Open meetings violations occur frequently, especially with small, local government bodies that may be ill informed of the open meeting requirements. Often one call from a lawyer is enough to prompt the proper open door policy.

If the agency still insists on meeting in private, legal action may be necessary. Here again, the state laws differ in the penalties and remedies available for violations of the open meeting requirements. Civil remedies are by far the most common. As one civil remedy, the laws typically provide that you may go to court to

obtain an injunction—a court order preventing further or future violations. Furthermore, some of the laws specify that government actions taken in violation of the open meeting requirements be declared void. If you win your case, the law also may require the errant agency to pay your legal fees.

In addition to these civil lines of recourse, some statutes provide that misdemeanor criminal penalties may be imposed upon public officials who meet in knowing violation of the law. Proving a knowing violation is difficult, though, so even in states where criminal sanctions are on the books, prosecutions are rare.

### ***A Constitutional Tremor***

A federal Court of Appeals jolted the long-established world of open-meetings laws in 2009 when it ruled that the Texas Open Meetings Act raised First Amendment concerns and would have to undergo a strict-scrutiny level of review. A city council member in Alpine, Texas sent an e-mail to four other council members, asking their opinion on whether a particular item should be placed on the meeting agenda. The e-mail dialog appeared contrary to open-meeting requirements, and two of the council members were indicted for criminal violations of the state statute. Though the indictments were eventually dismissed, the two council members sued the district attorney and the state, claiming that their First Amendment right of free expression was infringed.

The federal District Court held that the First Amendment does not protect speech by elected officials related to their official duties. The Court of Appeals for the Fifth Circuit reversed, however. It held that First Amendment protection does apply to elected officials' job-related speech and that the statutory restriction on their informal conversations therefore had to be justified by a narrowly tailored, compelling government interest. "The First Amendment's protection of elected officials' speech is full, robust and analogous to that afforded citizens in general," the court said.<sup>17</sup> As this book went to press it was uncertain whether the court ruling would stand or whether the statutory provision in question could survive strict scrutiny. The ruling had the potential, however, to cause a thorough re-examination of open-meetings laws across the country.

## **THE FEDERAL MEETINGS STATUTE**

The federal law, called the **Sunshine Act** of 1976,<sup>18</sup> is similar in structure to the states' open meeting statutes. The Sunshine Act, aptly named because it opens government to the light of scrutiny, pertains to about fifty federal agencies and commissions. For these governmental bodies, the law sets two general requirements: First, the agencies must provide advance public notice of their meetings; second, the agencies must conduct these meetings openly.

Unlike some of the state laws, the federal Sunshine Act applies only to the executive branch of the government and only to agencies "headed by a collegial

body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate.” This leaves out much of the federal government, of course, but virtually all the important regulatory agencies are covered, including the Federal Trade Commission, the Securities and Exchange Commission, the Federal Communications Commission, and the Nuclear Regulatory Commission.

Congress did not include itself under the act, and it may decide on a case-by-case basis whether its own proceedings will be open to the public. (Traditionally, sessions of the full House and Senate have been open, and in the past twenty years a greater number of committee meetings and investigative hearings have also been conducted in public. The push toward openness has even led to gavel-to-gavel cable TV coverage of congressional sessions.)

For the covered agencies, meetings are defined broadly as “the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official business.” Public notice must be made of all meetings, even those that might legally be closed, at least one week in advance of the meeting. The notice, which must appear in the *Federal Register* and some other public place, must specify the time, place, and general subject of the meeting.

The federal Sunshine Act lists ten exceptions to the requirement that meetings be open to the public—fewer exceptions than most state statutes provide. The act says that agencies may vote to hold closed meetings when it is determined that the meeting would concern

1. National defense or foreign policy secrets
2. Internal personnel practices of the agency
3. Information specifically exempted from disclosure by a separate federal statute
4. Trade secrets of private business
5. Accusations of crime
6. Personal information that if disclosed would constitute an unwarranted invasion of privacy
7. Investigative information compiled for law enforcement purposes
8. Reports on government oversight of financial institutions
9. Information that would significantly frustrate implementation of agency actions or would threaten the stability of a financial institution or the economy
10. The agency’s participation in a lawsuit or its own quasi-judicial functions, such as conducting hearings or issuing subpoenas.

The law presumes openness. Closed sessions must be justified under one of the statutory exceptions. Even in those cases where the act does not require an open meeting, however, the agency is usually free to hold an open meeting if it wishes.



### ***The Federal Sunshine Act***

- Is the meeting one of a federal, executive branch agency headed by two or more presidentially appointed members?
- Has the agency provided one week's advance public notice of its meeting?
- Is the meeting open to the public and media, except for deliberations that fall within ten specified exception categories?

#### ***Remedies for Violation***

To enforce the provisions of the Sunshine Act against a federal agency, a lawsuit must be filed in federal District Court. The court can issue an order requiring further deliberations to be open, and if the plaintiff is victorious, it can award the plaintiff court costs and lawyers' fees. The court cannot, however, void the actions taken at improperly closed meetings or punish individual officials.

## **GOVERNMENT RECORDS**

Just as with government proceedings, all state legislatures and the Congress have concluded that government records should generally be open for public inspection. Here again, the First Amendment is not interpreted to force government records into the open, but the legislatures have passed statutes that pick up this slack. In passing **open records laws**, Congress and the states have agreed that the availability of documents relating to the public's business should not be left to the whim of government officials or clerks.

### **THE FREEDOM OF INFORMATION ACT**

Congress passed the **Freedom of Information Act (FOIA)**<sup>19</sup> in 1966 and thereby opened a huge—even mind-staggering—storehouse of government documents. Similar to the Sunshine Act passed ten years later, the FOIA created a system of presumptive availability. The public and the media have a right to inspect government documents unless the information they seek is properly classified under one of nine statutory exemptions. It is important to note that the FOIA was created for the benefit of the public at large, not just the news media. The goal was to help ensure that people who want to learn more about the workings of their government can do so.

The FOIA applies to a much broader range of government than does the Sunshine Act, however, because the FOIA isn't limited to multimember, presidentially appointed bodies. The FOIA covers virtually every unit in the executive



branch of the federal government except for the president and the president's immediate staff. In addition to independent regulatory agencies such as the Federal Trade Commission, the FOIA covers the executive branch departments (such as the Defense Department and the Justice Department—including the FBI) and government-controlled corporations (such as the Postal Service). The act does not cover the legislative or judicial branches of the federal government, however.

Communicators from every type of medium—from giant television networks to small weekly newspapers to trade journals—have relied on documents obtained through the FOIA. FOIA documents have been used by the media to uncover developing news stories, to double-check theories and facts, or to elaborate on historical events. In all, federal agencies receive hundreds of thousands of FOIA requests a year, not only from journalists but also from private individuals, attorneys, and businesses. For example, in fiscal year 2008 NASA received about 1,300 FOIA requests; the Securities and Exchange Commission received 9,600; the CIA received 1,900; the Department of Homeland Security received 108,950; the Department of Justice received 59,600; and the Department of Defense received 71,200.

Of the FOIA requests processed by the Defense Department in 2008, about 40 percent were granted in full; 21 percent were partially granted; 3 percent were fully denied based on legal exemptions; and another 36 percent were not filled for other reasons, such as the records not existing in the department or not being adequately described in the request. In the Defense Department alone, some 690 staff were employed to handle FOIA matters, and it was estimated that the costs associated with processing FOIA requests in 2008 amounted to \$68 million. All federal agencies and departments are required to report their FOIA request data annually.

### ***Which Records Are Covered?***

The FOIA broadly covers agency-generated documents that are in the agency's possession. This means that the act covers only documents that the agency wrote, commissioned, or ordered. It does not cover documents such as presidential transition team recommendations, which might end up in agency file cabinets but which were not compiled at the behest of the agency in the course of its official business. Nor does the act require agencies to generate or retrieve records not in their physical possession at the time of the request.

What about items created solely for personal convenience, such as phone message slips or notations on a calendar? These are not considered agency records under the act unless they are also used for some official agency purpose. On the other hand, the term *records* is interpreted broadly to include any reproducible form of documentary information, such as papers, electronic databases, films, sound recordings, and photographs.

### ***Exemptions from Disclosure***

The FOIA specifies nine disclosure exemptions that agencies may use to keep documents secret. The exemptions cover records relating to the following:

1. National defense and foreign policy secrets
2. Internal agency personnel rules and practices
3. Information specifically exempted by other federal statutes (a catchall exemption)
4. Trade secrets and commercial or financial information obtained from businesses in confidence
5. Internal agency memos and policy discussions
6. Personal information, such as medical reports, that if disclosed would invade privacy
7. Law enforcement investigative information
8. Federally regulated financial institutions
9. Oil and gas well data of private companies

Other than Exemptions 5 and 9, the FOIA exemptions are similar to those of the federal Sunshine Act pertaining to open meetings. And, other than some of the laws incorporated under Exemption 3, the exemptions are not mandatory. This means that the government is permitted, but usually not required, to withhold information that properly falls within these categories.

Critics of the FOIA over the years have said that it is riddled with too many broad exceptions and that it is still too easy for the government to keep records secret. In 1974 Congress enacted, over President Gerald Ford's veto, several amendments that significantly strengthened the FOIA. In 1996 another package of strengthening amendments was enacted that is known as the Electronic Freedom of Information Act Amendments.

The FOIA is an important tool for journalists—one that is used each year to uncover many important stories. The act is also used by businesspeople and special interest groups to gain information about markets, competitors, and government decision making. But many variables come into play in determining how well the act will work for you in practice—variables such as the attitude toward openness by a presidential administration, the rules put into place by a particular agency chief, or the backlog of FOIA requests facing an agency. Following is a closer look at the FOIA exemptions that news media may be most likely to encounter:

***Exemption 1*** Exemption 1, dealing with national security, gives the White House broad discretion to establish through executive order the specific criteria by which documents related to national defense or foreign affairs will be classified as confidential. Although certainly necessary up to some point, this discretion also opens the door to abuse.

In 1974 Congress tightened the exception slightly, amending the FOIA to give federal courts the power to inspect classified documents in private to determine whether they were properly classified under the president's criteria. (This is called an *in camera* review.) Nevertheless, the courts may not second-guess the classification criteria; they may determine only whether the criteria could reasonably apply to the documents in question.

**Exemption 2** This exemption allows agencies to withhold documents “related solely to the internal personnel rules and practices of an agency.” A recent decision provides guidance on this exemption. Public Citizen, a nonprofit consumer advocacy group, had requested documents from the federal Office of Management and Budget (OMB), which generally screens other agencies’ budget-related and legislative materials before they are submitted to Congress. Specifically, Public Citizen wanted to learn which agencies must obtain clearance before transmitting reports, testimony, and other materials to Congress and which agencies are exempted from the clearance requirement, and why. The OMB eventually identified about twenty documents to meet the request but withheld significant portions of fourteen of them, claiming Exemption 2 applied because much of the material provided guidance on how staff was to exercise judgment. The District Court agreed.

The Court of Appeals for the D.C. Circuit reversed, however, saying these were not the kind of internal policies Exemption 2 had in mind: “[T]he documents at issue here lie at the core of what FOIA seeks to expose to public scrutiny. They explain how a powerful agency performing a central role in the functioning of the federal government carries out its responsibilities and interacts with other government agencies. . . . Where, as here, agency documents have significant external effects on other government agencies, they are not ‘predominantly internal’ within the meaning of Exemption 2.”<sup>20</sup>

**Exemption 3** Exemption 3 is a sort of catchall exemption that is often cited by federal agencies to deny access. This exemption incorporates federal statutes—other than the FOIA—that specifically prohibit the release of certain information. For example, federal laws require confidentiality for Census Bureau records,<sup>21</sup> individuals’ tax returns,<sup>22</sup> and patent applications.<sup>23</sup> Remember that these separate statutes are different from the usual structure of the FOIA in that they *require* confidentiality rather than merely allow it.

**Exemption 5** Another widely used exemption is the fifth, pertaining to “inter-agency or intra-agency memorandums or letters.” According to the U.S. Supreme Court, this exemption is intended to shield from FOIA requests the same kinds of documents that would normally be privileged in the civil discovery phase of a lawsuit.<sup>24</sup> Therefore, Exemption 5 incorporates the attorney-client privilege, which

protects communications between an agency and its lawyer, and the so-called **executive privilege**, which protects the working papers, draft reports, or preliminary opinion memos that are used in the advisory and deliberative processes within government. The purpose of this privilege is to sustain the sort of frankness that is necessary for sound decision making. Therefore, the exemption typically shields documents that are generated *before* the adoption of agency policy and that reflect the give-and-take of the consultative process.

In 1974 President Nixon claimed executive privilege when several of the infamous White House tapes were subpoenaed by the special prosecutor for use in the Watergate cover-up trial of Nixon's aides. Nixon argued that release of the tapes would damage the constitutional integrity of presidential decision making. In *United States v. Nixon*,<sup>25</sup> the Supreme Court recognized the need for executive level candor and thus for the privilege. But it also said that, absent a need to protect military, diplomatic, or national security secrets, the executive privilege is not absolute. The Court conducted an *in camera* (that is, private) review of the tapes and then weighed the need for presidential confidentiality against the need for fair and public administration of justice. In the end the Court ordered Nixon to honor the subpoena. The Nixon decision was based on constitutional doctrine, not the FOIA. But it illustrates the concept of deliberative confidentiality—and the possible public-interest limitations to that confidentiality as embodied in FOIA Exemption 5.

**Exemption 6** This personal privacy exemption generally applies to intimate personal or family life details deemed not to be of important public interest. The exemption essentially requires a balancing of the individual's privacy rights against the public's right to government information. Therefore, application of this exemption requires a context-specific analysis by the agency. Not all information labeled "medical" would necessarily be exempt, for example. And information requests in this area can be made more persuasive by stating the reasons behind them.

An historic, high-profile case involving NASA serves to illustrate the balancing nature of this exemption. In January 1986 the space shuttle *Challenger* exploded shortly after take-off, killing the entire crew. An audiotape had been made in the cockpit during the brief flight, and that tape was recovered from the ocean floor by NASA. The *New York Times* made a FOIA request for the tape, which contained brief conversations of the *Challenger* astronauts. NASA responded by providing a written transcript of the tape, but it refused to duplicate the actual audio tape.

In 1990 a sharply divided U.S. Court of Appeals held that the actual audio might indeed intrude on privacy, that it was similar in nature to personnel and medical files, and that it could fall under Exemption 6. The case was sent back to the lower court to determine whether public dissemination of the tape would indeed invade the privacy of the astronauts' *families* by exacerbating their grief

and to determine whether the public interest in access outweighs those privacy interests.<sup>26</sup> The lower court ultimately ruled that the tape need not be disclosed.

**Exemption 7** This multi-part exemption pertains to information compiled for law enforcement purposes and is another exemption often confronted by the media. Generally Exemption 7 allows law enforcement records to be kept confidential if their release could (a) reasonably be expected to interfere with enforcement proceedings, (b) deprive a person of a fair trial, (c) unnecessarily invade personal privacy, (d) disclose the identity of confidential sources, (e) reveal investigative techniques, or (f) endanger the life of any individual. In some cases, the agency may refuse to confirm or deny that certain records even exist.

Among the law enforcement records that might be most useful to the news media are the computerized criminal histories kept by the FBI. These complete histories, often called rap sheets, list the arrests, criminal charges, convictions, and sentences of tens of millions of people. But in 1989 the Supreme Court ruled against public access to these records. In *U.S. Department of Justice v. Reporter's Committee for Freedom of the Press*, a CBS journalist had requested from the FBI the rap sheet for an individual whose business was dominated by organized-crime figures. The FBI declined to release the document, citing FOIA Exemption 7(c), an unwarranted invasion of personal privacy. The Supreme Court sided with the FBI, even though the individual events summarized in rap sheets are typically a matter of public record at the applicable courthouses and police stations around the country.

In Justice Stevens' opinion for the unanimous Court, he drew a practical distinction between the privacy-invading potential of scattered bits of information and a comprehensive, computerized file: "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."<sup>27</sup> Having concluded that privacy was indeed at stake, the Court then considered whether the invasion of privacy in this case would be unwarranted. Exemption 7(c) applies only to *unwarranted* invasions of privacy. In order to answer this question, the Court referred to the basic purpose of the FOIA: to open agency action to the light of public scrutiny. If the requested document relates to that statutory purpose, then the sacrifice of privacy would be warranted. But in this case, the Court concluded, disclosure of historical information about a private individual would reveal little or nothing about the FBI's own conduct. The Court noted that "in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen."<sup>28</sup>

A 2004 court decision involving Exemption 7(c) concerned an issue similar to the one addressed in the NASA case under Exemption 6: Can records be



## The Freedom of Information Act

- Were the sought-after records generated by, and are they now housed by, an executive branch agency of the federal government?
- Did the agency respond within twenty working days of a formal, written FOIA request?
- If the records were not disclosed, did the agency specify which of the nine exemptions it deems to permit confidentiality?

withheld to protect the privacy of people other than the subjects of the records? The case began in 1993, when National Park Service employees were alerted to a body discovered in Ft. Marcy Park in Virginia. Found dead was Deputy White House Counsel Vincent Foster, Jr., with a revolver in one hand and a fatal gunshot wound to his head. Various government inquiries, by different agencies and independent counsels, concluded that Foster committed suicide. But skeptical citizen Allan Favish, who believed Foster actually was murdered, sought release of photos of the body, seeking to shed light on rumors of a government plot and cover-up. The government resisted disclosure under Exemption 7(c), claiming that release would constitute an unwarranted privacy invasion to Foster's family, which had sought to block release of the photos.

In *National Archives and Records Administration v. Favish*, the Supreme Court held that nondisclosure was warranted. First, the Court noted that law enforcement records often contain very intimate information and that Foster's relatives had a right to be shielded by the exemption, for their own peace of mind and tranquility, against "a sensation-seeking culture."<sup>29</sup> The Court further observed that deeply ingrained in almost all civilizations is the belief that family members should be allowed to mourn and honor their dead without unwarranted public exploitation and intrusion upon their grief.

The Court's analysis then shifted to whether, despite these privacy interests, there was an overriding public interest that warranted disclosure. When the privacy exemption is involved, the Court said, the burden is on the party seeking disclosure to show that a significant public interest is involved and that the information is likely to advance that interest. In this case, that would mean showing some credibility—more than bare suspicion—to the allegations of government impropriety. That standard was not met, so keeping the photos confidential was appropriate.

In 2008 and 2009 the hot FOIA issue was torture photographs. The American Civil Liberties Union and other human rights organizations had sought release of about twenty disturbing photos that were part of an Army investigation into alleged abuse of detainees held in U.S. custody in Iraq and Afghanistan. The Defense

Department argued that the photos could be withheld under law-enforcement Exemption 7(c) because they would constitute an unwarranted invasion of privacy and under Exemption 7(f) because their release could incite violence against U.S. troops and other coalition forces. The District Court ordered the photos released, with the detainees' identifying features blurred out. The Court of Appeals in 2008 agreed, ruling that the 7(c) concern was eliminated by blurring identifying features and that the 7(f) concern of violence against troops was too speculative and general.

Early in 2009 it appeared the new Obama administration and the Defense Department were prepared to release the photos, but then the administration appeared to change its mind. It asked for, and was granted, a stay of the Court of Appeals release order so that the administration could have time to seek a U.S. Supreme Court review of the case. Then Congress entered the act with the Detainee Records Photo Protection Act of 2009 (S.1285), which, if passed, would override the general FOIA provisions and keep the photos confidential. News reports at the time also indicated that the President might be willing to issue an executive order classifying the photos secret under Exemption 1.

### ***Filing Requests Under the FOIA***

The Reporters Committee for Freedom of the Press, a journalists' organization, recommends that anyone seeking government documents should first try to obtain the records through informal means. Simply contact the public information or FOIA officer at the appropriate agency, identify yourself, and specify the records you want to see. If you are turned down, the next step is to send the appropriate agency, by registered mail, a formal FOIA request. (An example FOIA request letter, from the NASA case noted earlier, is shown in Exhibit 6.1.) Advice on how to prepare a request is available on the Reporters Committee website, listed at the end of this book.

Generally, the more precise a request, the quicker the response. This means identifying documents by name, number, and date, if possible. But if you lack this information, just provide a description reasonable enough to allow the agency employee to locate the records you seek. Learning what documents are on file can be an investigative task in itself. Many federal agencies maintain document indexes that may be of assistance. You may even be uncertain which agency has the kinds of records you want. In this case, check the *United States Government Manual* at your library. It describes the responsibilities and offices of all government agencies.

Once a formal request is made under the FOIA, certain legal obligations apply to the agency. By statute the agency has twenty working days to respond to the FOIA request, although in practice delays are common. Complex, multi-document requests often go two or three months before the government responds. Under a recent amendment to the FOIA, all agencies must adopt regulations that stipulate a process for "expedited" processing of FOIA requests in cases where a "compelling need" for the information is demonstrated.<sup>30</sup> The FOIA does not

authorize an agency to withhold an entire document when only isolated portions of that document contain information that is exempt from disclosure. In such cases, the agency may excise the exempted portions—by blacking them out, for example—but it must release the remainder of the document.

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Most federal agencies will permit you to visit their offices and inspect the released FOIA documents in person. Or you may ask that the agency send copies of the requested documents, either by mail or electronically. In any case, the agencies sometimes collect fees for responding to requests. The act allows agencies to charge commercial users reasonable fees for searching and duplicating documents. News organizations and noncommercial scientific or educational organizations, however, can be charged only for the costs of duplication and not for the agency's costs in conducting the search. This is significant, because the fees for complicated records searches can run into thousands of dollars.

Regardless of these requester categories, though, you may be entitled to a waiver or reduction of fees if, in the words of the act, "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the interest of the requester." Therefore, even though you are not required to say why you want certain documents in order to make an enforceable FOIA request, you will need to volunteer that information if you also request a fee waiver.

If your request is denied, or the agency fails to respond, you may wish to follow with a formal appeal letter to the head of the agency. The agency has twenty working days to respond to the appeal. (A sample FOIA appeal letter is shown in Exhibit 6.2.)

### ***Going to Court***

If an appeal letter still does not bring results and you believe the agency has not adequately justified its refusal to release documents, your next step is to go to the

federal district court nearest you. If the agency fails to convince the court that the requested documents fall within one of the act's nine exemptions, the court will order the documents released.

A recent action by the ACLU illustrates the process. In the wake of the September 2001 terrorist attacks in New York and Washington, D.C., Congress

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passed the controversial USA Patriot Act, which expanded the federal government's authority to obtain personal information about people living in the United States. Ten months later, the ACLU sent FOIA request letters to the Justice Department and the FBI seeking records on how the new surveillance powers were being used. Specifically, the ACLU asked for the number of times government

investigators had obtained individuals' book-borrowing lists from libraries and traced citizens' phone calls or e-mails, among other things. Saying the requested records pertained to a matter of widespread media interest and public concerns about the government's integrity and a possible chilling effect on free speech, the ACLU also requested expedited processing of the request.

The agencies formally agreed to expedite the process. But after two months, no records had been produced. The ACLU then filed a lawsuit in federal District Court, seeking an injunction to force production of the records. Ultimately, though, the court held in favor of the government, saying the information could be withheld under Exemption 1 of FOIA.<sup>31</sup>

### ***The Electronic FOIA Amendments of 1996***

By the early 1990s many federal agencies were suffering from backlogs of FOIA requests and were routinely failing to meet the required time limit for responding. The Clinton administration in 1993 made an effort to reduce the response time by requiring agencies to apply a presumption in favor of disclosure. But the number of pending FOIA requests continued to increase. A growing number of information seekers were requesting documents in various electronic forms and formats. Many agencies were slow to respond to the computer age of public document requests, and there was even some ambiguity under the FOIA whether some kinds of electronic information were covered by the act.

All this prompted Congress to enact the Electronic Freedom of Information Act Amendments (EFOIAA) of 1996.<sup>32</sup> The amendments were of two main types: (1) administrative reforms intended to ease the backlogs and delays and (2) technological reforms intended to update the FOIA for the computer age of communicating with citizens. Among other things, the EFOIAA accomplished the following:

- Clarified that electronic agency records and paper records are equally subject to the disclosure requirement
- Obligated agencies to provide records in the electronic format requested, where technically feasible
- Increased the scope of each agency's required annual FOIA report to Congress
- Required that public records created after November 1, 1996 be made available within one year of their creation by "computer telecommunications" and required agencies to create indexes of records available by computer
- Narrowed the "exceptional circumstances" provision of the FOIA that allows a court to extend the time limit for an agency to respond to requests
- Required that agencies affirmatively publish certain kinds of information online, including final agency opinions and policies and any requested, nonexempt material that is likely to be requested again

Critics complained that many agencies were slow to comply with their obligations under the EFOIAA. But though the amendments created new obligations for agencies to store, search, and disseminate information electronically, the legislation did not supply additional funding for the costs of compliance.

### ***The “OPEN” Act Amendments of 2007***

Another significant package of FOIA amendments, known as the “Openness Promotes Effectiveness in our National Government Act,” or OPEN Government Act of 2007, was enacted in December 2007. The legislation did not change the basic framework or exemptions of the FOIA, but it made important procedural changes to the way requests and appeals are handled:

- Expanded the definition of “news media representative,” potentially making it easier for freelance journalists, bloggers, website editors, and other alternative media representatives to qualify for fee waivers.
- Made it easier for those seeking documents in the public interest to obtain attorney’s fees and other costs if they prevail in FOIA appeal litigation.
- Mandated that each agency create a requester-accessible tracking and status system for document requests that will take longer than ten days to process.
- Established the Office of Government Information Services (OGIS), within the National Archives and Records Administration, to serve as FOIA ombudsman for the purpose of auditing agency compliance procedures and mediating disputes.

Congress approved \$1 million in start-up funds for the OGIS in 2009. Whether the office will play a significant role in improving agency efficiency and reducing FOIA request backlogs remains to be seen. Another question is how the role of that new office will be coordinated with the Justice Department’s Office of Information Policy, which has been primarily responsible for guiding all federal agencies on FOIA compliance.

### ***Administrative Discretion***

In practice, the fairly straightforward language of the Freedom of Information Act and its nine exemptions still leaves room for some administrative judgment and discretion. From one agency to another, and from one presidential administration to another, the enthusiasm for filling FOIA requests may vary somewhat. And occasionally the issuance of formal directives may influence whether agencies take a more conservative or more liberal approach to releasing documents for which an exemption might arguably apply.

In October 2001, shortly after the New York and Washington, D.C. terrorist attacks, Attorney General John Ashcroft sent a memo throughout the executive branch of government that read in part: “Any discretionary decisions by your

agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.” The memo went on to assure agencies that Ashcroft’s Justice Department would fully defend agencies’ reasonable decisions to withhold records under the FOIA’s exemptions. Critics charged that the Ashcroft directive was an overreaction to the terrorist threat and that it would turn back the clock on the public’s right to government information. But at the time concern also existed that detailed information about such things as bridge and power plant construction could get into the hands of the wrong people.

On President Obama’s first full day in office he issued a memo that reversed the Bush Administration’s stance and called on all agencies to “usher in a new era of open government.” This was followed, in March 2009, by a memo from Attorney General Eric Holder that contained additional guidelines on how agencies would be expected to apply a presumption of openness when administering the FOIA. Yet the new president promptly found himself in the middle of controversy over the release of Defense Department torture photos, as noted earlier in this chapter.

## STATE OPEN RECORDS LAWS

The states have adopted open records statutes that cover most statewide governmental agencies as well as the records of local government units—cities, counties, school districts, and so on. Most of these statutes conform to the general mold of the federal FOIA, and they typically do not cover documents of the judicial branch of government or the records of state legislatures (though many court and legislative records are made available to the public, in keeping with tradition or internal rules).

As with the federal law, most states provide that all records are presumptively open and then list certain exceptions. Some states take the opposite approach, however, specifically listing the kinds of records that are open to inspection. Also in line with the federal law, the reasons for your access request are normally considered irrelevant to the legal duty to release documents. Recall the Hypothetical at the beginning of this chapter. A clerk in a city health department responded to your document request by asking, “Why do you want to see it?” Normally you are not obliged to answer this question, though it is often asked. If you do answer, the usual rule is that neither your intended use nor your identity may properly be the basis for an agency decision to keep records secret.

### ***Numerous Exceptions***

In comparison with the federal law, however, most state open records laws are far more complicated. This is particularly evident in the lists of exceptions to required disclosure—the kinds of information that agencies may or must keep

confidential. Whereas the federal law lists nine exemptions, state statutes often list twenty or more. To some extent, at least, this can be traced to the fact that state and local agencies encompass a much broader range of public services and records than does the federal government. In addition to the kinds of exemptions listed in the federal FOIA, for example, the state statutes may exempt disclosure of such materials as adoption records, welfare records, test questions for professional licensing exams or academic exams, library borrower records, and student files kept by public schools.

It is important to note that many of the exemptions to these access laws are born not out of a need to ensure effectiveness and efficiency in government but out of a perceived need to protect the personal privacy of residents. In other words, the open records laws are another arena where government and the courts must balance the public's right to know about government against the individual's right to privacy. This, of course, was the problem discussed under Exemption 7, when the U.S. Supreme Court allowed criminal rap sheets to be kept confidential under the federal FOIA. At the state level, the privacy question may arise in an even broader range of circumstances.

For example, in 1989 the California Legislature limited access to driver's license records that indicate home addresses. The restriction was prompted by the slaying of television actress Rebecca Schaeffer. The man accused in her death had used a private detective to obtain her address through the state Department of Motor Vehicles. Though media organizations generally opposed the access restriction, one of the state's leading newspapers supported it, saying that agency records "ought not be a research library for the depraved and the demented."<sup>33</sup>

State open records laws differ considerably in their lists of exemptions and also in such specifics as methods of enforcement and mandated agency response times. Some states require rapid agency responses, for example—as fast as three business days—while others simply require responses within a "reasonable" time.

It is important that journalists be familiar with the open records laws of their state, because government records at the state and local level are an important and expanding source of information. Sometimes such records are the only reliable or quotable source of information. Furthermore, agency employees are not always well informed about the open records laws. The news media should be prepared to educate them.

### ***Private Organizations' Documents***

Does the presumption of openness in state open records statutes apply only to agency-created documents, or does it apply to any document an agency comes to possess in the course of business—including those documents created by private, nongovernmental organizations? This issue arose in an odd manner in June 2009 when the Associated Press, the *Orlando Sentinel*, and several other Florida news media filed a complaint against the NCAA and Florida State University. The

university, a state agency, had been the subject of an academic cheating investigation conducted in part by the NCAA, a private organization through which colleges and universities govern athletics competition. The NCAA issued harsh sanctions against the university, and the campus appealed to the NCAA to reconsider. The NCAA response to the appeal was made available to Florida State's lawyers only on a secure website that allowed viewing only—no downloading or printing. Media charged that this was an illegal scheme designed to keep the NCAA response from becoming a public record under Florida law, which says records are public when they are “received” by a state agency. Thus the interesting question under state law: Once the viewing was allowed, even though the state was absent a copy, was the NCAA in possession of a public record?

### ***E-mails and Text Messages***

In recent years another highly important feature to look for in open records laws is the extent to which they cover e-mails, pages, and text messages that are transmitted on government-owned electronic devices. Under most open records statutes today it is clear that any writings pertaining to the public's business are potentially covered, regardless of their physical form: hard-copy, digital, or otherwise. In practice, though, the relatively informal messages transmitted by e-mail and texting, while increasingly important in the functioning of government, are also difficult to obtain and may be housed with private communications vendors outside government.

The case of former Detroit mayor Kwame Kilpatrick illustrates the potential significance of such communications. Staff of the *Detroit Free Press* obtained sexually explicit text messages sent and received by the mayor on city-owned equipment, which helped them expose perjury and an improper affair between the mayor and his chief of staff. Kilpatrick lost his office and served jail time for lying under oath, and for their efforts the *Free Press* won a 2009 Pulitzer Prize for local reporting.

### ***Special Problem: Police Records***

Among the records most frequently sought by the news media are those kept by law enforcement agencies. The laws pertaining to these records are often complicated and vague, however, with different rules pertaining to different kinds of records. Most often the media desire for information would fall under one of three categories: (1) routine police blotter information about incidents and arrests; (2) information about the progress of an ongoing investigation; and (3) rap sheets—the detailed criminal histories of individuals, including arrests, charges, and convictions.

The first category of information, basic data on incidents and arrests, is typically the most readily available for public inspection. Most state laws require that public access be allowed to such information as the nature, time, and location of



reported crimes; the names, ages, and addresses of people arrested; the dates, times, and places of the arrests; the charges for which the arrests were made; and the circumstances surrounding arrests. Such information is listed chronologically at police stations. In most cases, 911 tape recordings are considered open records too.

The second category of law enforcement records, information about ongoing investigations, is usually more difficult to obtain. This is because investigative records are specifically exempted under the typical state public records statute and under Exemption 7 of the federal FOIA. As with the federal law, though, most of the state exemptions simply mean that the police agency *may* keep the records confidential; in most cases they don't *require* it.

All in all, it is the third category, individuals' criminal histories, that is the most difficult kind of police record to obtain. As you read under Exemption 7, the Supreme Court has ruled that the FBI is allowed to keep such compilations confidential on privacy grounds. But many of the state laws go farther, *requiring* that rap sheets be kept secret from the public and the media. The history file might contain nothing more than items that appeared at one time on a police blotter. Yet the theory is that the release of such a convenient compilation, perhaps dating back many years, could be a highly unwarranted and devastating invasion of privacy. Also, rap sheets are notoriously incomplete. They might indicate an arrest, for example, without also noting that criminal charges were dropped.

Of course, the individual states may differ significantly from the general summary here. In Florida, for example, criminal histories are generally considered open public records that may be sealed only under an appropriate court order. When you research your own state's access statutes and the court opinions interpreting them, determine too whether tighter rules apply to police records that identify juvenile offenders.

### **Media Hotlines**

To learn more about your state's access laws, both for records and for meetings, you might begin by locating and reading the statutes. Statewide press associations, the offices of state attorneys general, and the individual recordkeeping agencies sometimes publish helpful guides to the access laws.

Access problems frequently arise that cannot be solved simply by reading the applicable statute or a pamphlet. The statutory language may be vague, or the situation may be an unusual one not addressed by the statute. Sometimes the government blocks access, even when the plain language of a statute mandates openness. Where can you turn for prompt legal help, particularly if you work for a small media organization without a standby lawyer for such matters?

The answer in many areas of the country is a media law hotline. About twenty hotlines are in operation, some of them logging five hundred or more calls a year. The hotlines are organized and funded in a variety of ways. Most commonly, the

hotlines are linked to law firms and are funded by contributions from a coalition of news media and media associations. In some cases, individual press associations operate their own hotlines, funded by dues or subscription fees from their member organizations. The hotline lawyers can provide an informed judgment about your legal rights and also may be able to generate quick results for you with a phone call or letter to the offending government officer.

## SELECTIVE ACCESS BY GOVERNMENT

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This chapter has described how access statutes can force government officials to open meetings and records to the public. But these statutes do not apply to all branches or offices of government or to all kinds of information. In those cases where statutes don't dictate the disclosure rules, officials are generally free under the U.S. Constitution to restrict access and keep information and proceedings confidential.

Exceptions do exist—in some narrow circumstances, despite the general principle stated at the beginning of this chapter, provisions in the U.S. Constitution *do* work to guarantee access to newsworthy places and information. One of these circumstances—court trials—is discussed in Chapter 7. Another such circumstance is when government officials voluntarily grant access or information to segments of the public but then seek to deny access to the media or certain members of the media. This is called **selective access**.

Even though government officials may not be required to grant access, once they voluntarily do so, constitutional principles of free speech and equal treatment do come into play. The **equal protection clause** in the Fourteenth Amendment to the U.S. Constitution requires that similarly situated people not be treated differently with respect to personal rights. Discrimination must be justified by strong government interests. The **due process clause** of the Fifth Amendment also may provide some protection. It requires that government clearly identify the factual bases for denying benefits to a person when those benefits are routinely granted to others. Courts have used the First Amendment, in tandem with the equal protection clause or the due process clause, to prohibit some instances of selective access by government. But in other instances, selective access will pass these constitutional tests or will not even be deemed to raise constitutional concerns.

One of the classic cases is *Borreca v. Fasi*, which in 1974 pitted the mayor of Honolulu, Hawaii, against a reporter for the *Honolulu Star-Bulletin*. The mayor thought the paper's regular city hall reporter had been biased, irresponsible, and malicious in his reporting on the mayor and his administration. So the mayor instructed his staff to keep the reporter out of future news conferences, though all media representatives were generally free to attend. The reporter and his newspaper sought a court injunction to gain entry to the conferences and won.

The federal District Court said First Amendment freedom of the press includes a limited right of reasonable access to news in “the public galleries, the press rooms and the press conferences dealing with government.”<sup>34</sup> To overcome that right, the mayor would have to show a compelling government interest, the court said, and stifling a critical or even reckless reporter is not reason enough.

The *Borreca* case left many questions, however. Does the equal access right mean the mayor would have to answer all journalists’ questions? Does it prohibit the mayor from selecting only certain reporters to meet with individually? These questions were answered by another federal court in the 1999 case of *Snyder v. Ringgold*. Journalist Terrie Snyder specialized in coverage of the Baltimore City Police Department. In the mid-1990s, her relationship with the police department’s public information officer soured. The PIO, Samuel Ringgold, told other officers not to trust Ms. Snyder and never to go off the record with her. When Snyder’s TV station arranged for an exclusive interview with officers in the homicide division, Ringgold contacted the station and said that if the TV crew included Snyder, access for the interview would not be granted. Ringgold contacted another of Snyder’s employers, a newspaper, and announced that he would no longer talk with her individually about any story. And when Snyder requested an interview with the police commissioner, her interview was limited to just five minutes.

Snyder sued, claiming a violation of her First and Fourth Amendment rights to equal access. But the court distinguished this case from *Borreca*, which concerned general news conferences open to all media. In contrast, Snyder was not denied information generally available to all media. Rather, Ringgold was merely exercising his right not to speak with particular representatives of the media whom he may regard as untrustworthy, the court said. It wrote:

No reporter has a right to access to a particular interview, exclusive story, or off the record statement. Snyder, therefore, is not seeking equal access to public information, but the kind of preferential treatment that public officials can provide to certain journalists, and that, in Ringgold’s opinion, she does not merit. While a constitutional right to equal access for members of the press may well exist, extending the right to encompass preferential treatment would completely change the longstanding relationship and understandings between journalists and public officials.<sup>35</sup>

Another question is where the government may constitutionally draw the line when space for the media is limited. In a 1970 case, the Los Angeles Police Department denied press passes to reporters at the *Los Angeles Free Press*, a weekly newspaper. The department had been issuing thousands of press passes each year but decided to restrict this practice in order to protect against chaos at disaster scenes. Under the new policy the department would issue passes only to reporters who needed them in connection with their regular news-gathering duties. *Free Press* employees were denied passes on the ground that their weekly paper

was not regularly engaged in spot coverage of police activities. Rather, the paper was primarily for features and analysis. The *Free Press* sued, but the California Court of Appeal sided with the government.

The court ruled that the denial of press passes did not arbitrarily discriminate against the newspaper in violation of its right to equal protection of the law:

There is no constitutional requirement that [the department] show uniform treatment to all publications or news media in issuing press passes, the only requirement being that there be a reasonable basis for the classification imposed.

. . . Regular coverage of police and fire news provides a reasonable basis for classification of persons who seek the privilege of crossing police lines.<sup>36</sup>

The law concerning selective media access to government needs further development. As a general summary, however, government may not broadly allow access but then exclude certain individuals unless the individuals clearly belong to a different classification of people, the exclusion of whom is reasonable, or unless some compelling interest justifies the exclusion of a particular individual. For example, the White House could decide to conduct presidential news conferences but, in light of limited seating, restrict access to professional, Washington-based journalists. A different class of people—high school journalism students—might reasonably be excluded. Furthermore, even a professional, Washington-based journalist might be legally excluded if a compelling reason is shown—for example, a security risk if the journalist has made death threats against the president. But personal dislike for certain reporters or media, differences of political philosophy, or even prior instances of misleading reporting would not be constitutionally sufficient to support exclusion.

Selective access problems are fairly common. Another example was the Hypothetical at the beginning of this chapter. A guard barred you from the city council meeting because, he said, “No media allowed.” Even if this particular council session were not required to be open under the state’s open meetings law, the decision apparently had been made to allow entry to members of the general public. If so, it would now be a constitutional violation to single out members of the media for exclusion. A persuasive call to the city attorney, preferably from your lawyer, might have been enough to gain your entry to the meeting.

In some states the access statutes specifically command that access among media be equal, thus giving shut-out reporters a statutory argument as well as a constitutional one. This extra statutory language can be important when one particular reporter is given access to records or meetings that would not otherwise have to be open. Under these statutory provisions, other reporters then acquire the right to see the information. For example, the Colorado Open Records Act states that if a right to inspect exempt materials is given any employee of a newspaper, radio station, TV station, or other news-gathering agency, “it shall be allowed to all such media.”<sup>37</sup>

## Summary Points

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**In most situations the First Amendment** is not interpreted to convey special privileges for gathering information. Courts do speak of a “limited First Amendment right of access,” but this right arises only in limited situations involving government information.

**Without constitutional access rights, members of the media** are subject to the same laws of trespass as members of the general public. Civil trespass laws may be enforced by the occupiers of both private and government property, and some willful trespasses may amount to a crime.

**Recognizing the strong public policy** in favor of openness in government, however, all states and the federal government have passed freedom-of-information statutes that assure public access to government documents and meetings. These are important laws for the news gatherer, but they also contain numerous exceptions permitting information to be withheld, and they do not cover all branches and offices of government.

**At the federal level, the primary open meeting law** is the Sunshine Act, and the law granting rights of access to records is the Freedom of Information Act, after which many of the state laws are modeled.

**In some instances, specific statutes** also prohibit officials from allowing access to certain kinds of information, usually in the interest of personal privacy rights.

**When government does grant general access** to information, it may not discriminate against particular media or individuals with whom it happens to disagree. Unwarranted exclusion may violate the First Amendment and the equal protection clause of the Fourteenth Amendment.

**In this chapter’s Hypothetical, you would find** that open records and open meeting statutes would help you gain access to the city council meeting and the health department report. You would not have to give an acceptable reason to authorities as a condition of access. As to your trespassing in the field, this conduct on your part would not be privileged under the First Amendment or any other legal authority. An act of trespass does not, however, give property owners or their employees a right to seize your journalistic property.

## Discussion Questions

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1. In TV journalism it has become rather common to create dramatic video by having a camera crew follow police right into a private residence or business to film an arrest or drug raid. Considering the trespass principles discussed

in this chapter, can such news-gathering methods be legal without the consent of the rightful occupier of the property? What kinds of factors would, or should, a TV station consider before deciding whether to send camera crews onto private property without consent?

2. For a plaintiff whose privacy has been invaded in her own home by a TV news crew that burst through the door, why exactly would trespass be a more appealing lawsuit than the intrusion tort discussed in Chapter 5?
3. Suppose a city council decided to cover press relations expenses by charging a fee to attend the mayor's press conferences. The fee—\$15—is the same for all media representatives for all press conferences. Do you think this practice would violate the constitutional requirement of equal access? Could the mayor grant exclusive interviews to some reporters and grant no interviews to others? If so, how is this legally distinguishable from holding a press conference exclusively for the mayor's five favorite reporters?

## Key Terms

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criminal trespass	implied consent
custom and usage	nominal damages
due process clause	open meeting laws
equal protection clause	open records laws
executive privilege	press pass
executive session	selective access
express consent	Sunshine Act
Freedom of Information Act (FOIA)	trespass

# Media and the Justice System



*After completing this chapter, you should*

- **Understand** the potential conflict between the First and Sixth Amendments to the Constitution.
- **Know** the customary means by which courts may ensure fair trials and the limited circumstances in which courtrooms may be closed or the media silenced.
- **Understand** the courts' traditional aversion to cameras and the current status of camera access rules.
- **Know** when the law may accord you a special privilege of not revealing sources or information to the government.

## MEDIA AND COURTS: A UNIQUE RELATIONSHIP

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The relationship between this nation's justice system and the media, especially the news media, has long involved tension, suspicion, theatrics, and unique legal challenges. Media pressure on the courts, and the potential for disrupting the process of justice, is most evident in high-profile trials. Such cases include

## Hypothetical

### The Mystery Homicide

A pregnant woman is found battered and stabbed to death in the upstairs bedroom of her expensive lakefront home. The victim's husband, a well-known physician, notifies police. He tells detectives that he was napping on the couch downstairs when he was awakened by his wife's screams. As he reached the top of the stairs, he was knocked unconscious, he says, by a large, masked figure. The next day, the doctor is arrested and charged with killing his wife.

Naturally, this quickly becomes a sensational mystery story for the media. You are a resourceful journalist. Over the next few weeks you talk with dozens of neighbors, friends, and acquaintances of the doctor and his deceased wife. You learn that the socialite couple had lately been exhibiting a rocky marriage and that, just two days before the slaying, the doctor had learned his wife was having a romance with another man.

A few days before the doctor's trial, you begin publishing what you learned—details of the couple's domestic arguments and adulterous flings. But after your story hits the newsstands, the judge issues a restrictive order. It prohibits the media from running anything further about the case until after the trial. The judge is concerned that stories like yours would make it nearly impossible to impanel an unbiased jury. Your paper decides to appeal the judge's order.

On the first day of trial, you and dozens of other media representatives arrive to find the courtroom closed to spectators and the media. The judge has decided to close her courtroom to head off what she thinks will surely be a distracting, circus-like atmosphere created by a pack of pushy reporters and their equipment.

Meanwhile, you pursue your own investigation. You find someone who has information tending to implicate others as the killers. Your source, a local bookie, says he will talk to you only on condition of complete anonymity. You agree, and he tells you that the doctor's wife was deeply involved in illicit gambling and owed hundreds of thousands of dollars to organized crime figures who have reputations for tough collection tactics. Observing the court's restrictive order, you don't run this immediately.

But you do mention your interview to editors and colleagues, and word somehow reaches the doctor's defense attorney. Next thing you know, you are subpoenaed to appear in court. The doctor's attorney wants to put you on the witness stand and have you answer detailed questions about what you heard, and from whom.

May you refuse to answer these questions in court, without going to jail? Would it be a breach of ethics if you did answer? Should you expect to win your appeal of the judge's restrictive order? Was it proper for the judge to close the courtroom?



the felony trials of sports celebrity O. J. Simpson in 1995, TV actor Robert Blake in 2005, pop-music legend Michael Jackson in 2005, and music producer Phil Spector in 2007 and 2009. Another example of media pressure on the justice system came in 2000 when Vice President Al Gore sought a recount of disputed Florida votes in his contest with George Bush. With the presidency at stake, nearly a hundred media trucks were parked outside the Tallahassee courtroom as cameras inside provided live video coverage to the world.

The relationship between media and the courts is vitally important. Coverage of crime and justice is among the most useful and expected services that a local news organization can provide the public. Even the justice system benefits, over the long term, when the public understands the system's procedures, rulings, and limitations. Research has suggested that public understanding of the justice system is lagging and that the media should seek ways to improve judicial coverage.<sup>1</sup>

Recognizing the need for media and the justice system to associate closely and the unique opportunities for friction and legal clashes, some communities have formed **bench/bar/media committees**. These groups of judges, lawyers, police officers, and newspeople meet periodically to discuss problems and, ideally, build cooperation. Most problems that bench/bar/media committees debate fall within two broad scenarios, which this chapter will examine.

In the first, the media want to publish or broadcast information related to a court proceeding, but judges or litigants see the media as a threat to a fair trial and seek to limit media access or publication. Chapter 2 examined the basic doctrine against prior restraint of speech, and Chapter 6 looked at rules of access. This chapter revisits those subjects—this time in the unique context of covering the justice system.

The second scenario is nearly a reverse of the first: The media have information, and the justice system wants it. The media may resist disclosure for a variety of reasons, such as the protection of a confidential source. But the justice system, with its substantial power to compel desired behavior, may be equally determined to uncover the information.

## THE QUEST FOR FAIR TRIALS

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One of the oldest continuing legal debates in this country arises from a perceived conflict between the media's right to free expression and an accused's right to a fair jury trial. To understand this conflict, you must appreciate how the model jury system was envisioned.

Historians trace the roots of trial by jury back a thousand years or more to medieval England. Trial by jury gradually took the place of tyrannical methods of justice, as typified by the secretive Court of the Star Chamber, which continued

to impose ruthless penalties until 1641. The initial practice was that neighbors of the accused would serve as jurors. These people presumably were in the best position to pass judgment, based not only on the evidence revealed in court but also on what they otherwise knew or heard from the community. Over time the rules of courtroom evidence became more refined, and so did the role of the jury. It was seen that out-of-court gossip and innuendo were terribly unreliable, yet potentially devastating to the accused. In the 1600s it became settled that juries would reach their verdicts based solely on the evidence presented in court. This also meant, of course, that jurors must not come to the courthouse with their minds already decided.

Thus the ideal concept of the jury system had changed by the time this nation was formed. The jury's role was no longer to bring community-held perceptions into the decision-making process. Rather, it was to apply unclouded judgment to legally admissible, court-presented evidence alone. The ideal jury had become a safeguard against two separate dangers: On the one hand, it was to rise above the shallow prejudices and rumors that may influence a general population; on the other, the jury continued as an alternative to a totally government-controlled justice system that, history shows, can become politicized and oppressive.

## THE SIXTH AMENDMENT GUARANTEE

The modern conception of the jury system was incorporated into the Sixth Amendment of the Constitution along with other guaranteed protections for criminal defendants. The amendment reads in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Courts have held that the **impartial jury** guarantee refers to a jury with an open, unprejudiced frame of mind at the beginning of trial that will be influenced only by the evidence legally presented during the trial. It is not required, however, that the jury have no prior knowledge of the case. Indeed, the requirement of a jury from the locale "wherein the crime shall have been committed" is an indication that the jury should have some knowledge of the circumstances. In short, the requirement is that the jury be fair.

The Sixth Amendment's standards apply to state as well as federal prosecutions because the provisions are applied to the states through the Fourteenth Amendment's due process clause. (Chapter 2 detailed how most of the Bill of Rights, including the First Amendment, became applicable to the states.) Though the Sixth Amendment applies only to criminal prosecutions, state constitutions or statutes typically set similar fair jury standards for civil trials. The main focus in this chapter, however, will be on criminal proceedings, where the bulk of free press/fair trial conflicts arise.

## THE FIRST AMENDMENT CONFLICT

A constitutional dilemma often occurs in the coverage of notorious crimes, when the media's First Amendment rights of free expression seem to conflict with the defendant's right to an impartial jury. The concern is that pervasive media coverage, replete with damning information of all sorts, may make it impossible to find or maintain an impartial jury. Chief Justice Warren Burger described the First Amendment/Sixth Amendment dilemma in his 1976 majority opinion in *Nebraska Press Association v. Stuart*:

The problems presented by this case are almost as old as the Republic. Neither in the Constitution nor in contemporaneous writings do we find that the conflict between these two important rights was anticipated, yet it is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press. . . .

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. . . . It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances. Yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it.<sup>2</sup>

Thus the challenge is one of ad hoc constitutional balancing, of devising the right tests to be applied on a case-by-case basis so that both of these important constitutional guarantees can be accommodated. The Sixth Amendment conflicts presented by media coverage can arise through both pretrial publicity and trial publicity—and they often raise different problems. With *pretrial* publicity, the concern is whether impartial jurors can be found by the time a trial is scheduled to begin. This is what the judge was worried about in the chapter Hypothetical when she ordered the newspaper to cease publishing stories about the case. With *trial* publicity, the concern is whether jurors, presuming they were impartial when impaneled, will be improperly influenced by media accounts of the proceedings or perhaps even by the mere presence of the media. This was the concern that led the judge to close the courtroom in the Hypothetical.

## WARNINGS FROM THE SUPREME COURT

Conflicts between the justice system and media reporting can be traced at least as far back as the 1830s, when newspapers began to achieve mass circulation. The U.S. Supreme Court reviewed its first trial publicity case in 1851—a case in which two jurors in a murder trial had read newspaper accounts of the evidence. The Court was unconvinced that the defendant deserved a new trial, however.

By the early 1900s, press coverage of crime and justice had reached a notably aggressive level, with frequent use of sketches and photographs. In 1935 it became evident that print and radio journalists could dominate criminal proceedings of national interest. In that year Bruno Hauptmann was tried for the kidnapping and death of Charles Lindbergh's infant son. Lindbergh was the nation's leading aviation hero at the time, and it is estimated that nearly one thousand reporters and photographers converged to cover the trial in a tiny New Jersey town. It was more than twenty years, however, before the U.S. Supreme Court began to reverse convictions on the ground of excessive media publicity.

In a series of cases between the late 1950s and mid-1960s, the U.S. Supreme Court clearly indicated to the nation's justice systems that the mass media could indeed jeopardize the constitutional standards of a fair trial. Five times during that period, the Supreme Court reversed criminal convictions—three of them in murders—because of prominent media coverage of the cases.

### ***Mad Dog Irvin***

In the 1961 case of *Irvin v. Dowd*, Irvin was indicted by a grand jury in Vanderburgh County, Indiana, in the slaying of one person. The media then generated a flood of maligning stories about the suspect and, to avoid local prejudice, he was granted a change of trial location to neighboring Gibson County. (Movement of a trial to another location is called a **change of venue**.) After being denied a second change of venue, Irvin was convicted and sentenced to death.

The U.S. Supreme Court eventually nullified the conviction, however. The high Court found a “pattern of prejudice” created by extensive newspaper and broadcast coverage beginning at the time of Irvin's arrest. For example, the media reported that “Mad Dog Irvin” had confessed to six murders and that he was “remorseless and without conscience.” The media also blanketed the rural area with reports about his juvenile criminal convictions, parole violations, and a military court martial for going AWOL. The Supreme Court reviewed the trial court's efforts to select a jury in the case. It found that 430 prospective jurors were examined and 268 of them were excused for having fixed opinions as to guilt. All twelve of the jurors finally seated told the judge they would be fair and impartial. Yet eight of the twelve also said they assumed Irvin was guilty.

In the Court's unanimous opinion, Justice Tom Clark wrote:

With such an opinion permeating [the jurors'] minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. When one's life is at stake—and accounting for the frailties of human nature—we can only say that in light of the circumstances here the finding of impartiality does not meet constitutional standards. Two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved. . . .<sup>3</sup>

Following the Supreme Court's reversal and remand, Irvin was convicted in a second trial and sentenced to life imprisonment.

### ***Rideau's Confession Film***

A 1963 case, *Rideau v. State of Louisiana*, involved a man who was suspected of robbing a bank, kidnapping several bank employees, and killing one of them. During a jailhouse interrogation by the local sheriff the suspect, Wilbert Rideau, admitted that he had perpetrated the crimes. The interrogation was filmed and, later the same day, a community TV station broadcast the confession film. The film was again broadcast on the following two days, thereby reaching a substantial portion of the citizens in the Louisiana parish. After Rideau was arraigned on robbery, kidnapping, and homicide charges, his lawyers requested a change of venue on the ground that the TV broadcasts prevented the defendant from receiving a fair trial in the parish. The request was denied, and Rideau was convicted and sentenced to death. At least three members of the jury had seen the televised confessions.

The U.S. Supreme Court reversed the conviction without requiring proof that the jurors' minds were swayed by the film. Wrote Justice Potter Stewart:

We hold that it was a denial of the due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.<sup>4</sup>

### ***Dr. Sam Sheppard***

In 1966 the Supreme Court decided *Sheppard v. Maxwell*, which involved facts similar to those that began the chapter Hypothetical. Sheppard's pregnant wife was bludgeoned to death in the couple's home in Bay Village, Ohio, and the doctor was charged with homicide. Before and during the nine-week trial, Sheppard was the subject of relentless, damning media coverage. The public read that Sheppard had refused to cooperate with the homicide investigation, that he surely was guilty because he had hired a famous criminal lawyer, and that Sheppard allegedly had had sexual relations with many women. One newspaper story announced, "The prosecution has a 'bombshell witness' on tap who will testify to Dr. Sam's display of fiery temper. . . ."<sup>5</sup> No such evidence was presented in court. Furthermore, at trial the media maintained a dominating presence in the courtroom, even occupying a press table near the front of the courtroom, adjacent to the jury box.

Sheppard was convicted and, after he had spent about ten years in prison, the U.S. Supreme Court took his case for review. The Court ruled that Sheppard had not had a fair trial, and it ordered him released from prison unless a new trial were provided. The Court's opinion, again by Justice Clark, chastised the trial judge for allowing a "carnival atmosphere" in the courtroom and for failing to control the media publicity:

The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. . . . Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise the environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. . . .

As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard's blood-stained pillow was published after being "doctored" to show more clearly an alleged imprint of a surgical instrument. . . .

The court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion. . . .

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . .<sup>6</sup>

The state decided to retry Sheppard on the homicide charge. Following a sixteen-day trial, this time with tight media restrictions, Sheppard was acquitted and released from prison.

Thus the Supreme Court in a series of opinions verified for trial judges a constitutional reason to be leery of the media. More than that, the Sheppard opinion in particular seemed to command judges to take virtually any steps necessary to ensure that cases were tried in the courtroom and not in the media.

### ***Justice Warren's Commission***

Further drawing attention to the threat of publicity to the judicial process was the 1964 *Report of the President's Commission on the Assassination of President John F. Kennedy*, often referred to as the Warren Commission Report. The commission criticized the clamorous media coverage of accused assassin Lee Harvey Oswald

and questioned whether he could have received a fair trial, had he not been killed just days after his arrest:

The Commission recognizes that the people of the United States, and indeed the world, had a deep-felt interest in learning of the events surrounding the death of President Kennedy, including the development of the investigation in Dallas. An informed public provided the ultimate guarantee that adequate steps would be taken to apprehend those responsible for the assassination. . . .

However, neither the press nor the public had a right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against Oswald. Undoubtedly the public was interested in these disclosures, but its curiosity should not have been satisfied at the expense of the accused's right to a trial by an impartial jury. The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime.<sup>7</sup>

Thus by the mid-1960s, with impetus from the Supreme Court and the prominent Warren Commission, sentiment was building within the legal community to better insulate the judicial process from media influence. Was this sentiment among lawyers and judges really justified?

## THE TRUE EFFECT OF PUBLICITY

Most media historians will readily concede that journalists have on occasion been reckless, disruptive, and sensationalistic in their coverage of legal proceedings. Coverage of Sheppard's prosecution may have been the lowest point—a case in which a physician was found not guilty by a second jury but nevertheless had lost his license and his livelihood and spent ten years in prison.

You should take a few minutes to think in terms of a broader perspective, however, before concluding that the media are an incessant threat to the justice system—as some judges and lawyers have grown to believe. First of all, consider some of the positive effects of trial and pretrial publicity upon the general public.

Accurate news coverage of serious crimes and their prosecutions can actually work to limit rumors and to reduce the terror of an uninformed public. Say a serial killer is at large in your town; so far he has brutally maimed fourteen college students who strolled near campus at night. Wouldn't you breathe more easily knowing that an arrest has been made, that substantial evidence has been collected, and that a prosecution is proceeding?

Also, detailed and timely coverage of legal proceedings allows the public to learn about the quality of the justice system itself—clearly a substantial public interest.

Take care not to be hasty in assuming that media coverage will prejudice jurors' deliberations at trial. In fact it is extremely rare that new trials are granted on the basis of prejudicial media influence, and such influence may be more

theory than reality. Empirical studies have shown that when publicity existed prior to trial, potential jurors often have difficulty recalling it by the time the trial rolls around. And when jurors do recall news reports, they may nevertheless be quite capable of purging preconceptions about a case and focusing on the trial evidence objectively.

Admittedly, empirical studies concerning jury performance have many weaknesses. Most involve experimental simulations, for example, rather than the study of real jurors. But taken as a whole these studies by social scientists can provide useful insights into the likely influence of media publicity. One researcher, Rita J. Simon, summarized the empirical studies in an article for the *Stanford Law Review*:

Experiments to date indicate that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence. The results show that when ordinary citizens become jurors, they assume a special role in which they apply different standards of proofs, more vigorous reasoning and greater detachment.<sup>8</sup>

Among the legal profession, too, many experts believe prejudicial media influence is mostly a myth. Experienced trial lawyer and law professor John Kaplan is another whose observations on this subject have appeared in the *Stanford Law Review*:

The short of my conclusions is that newspaper publicity, or any other assertions of facts of a case made outside of court, have virtually no impact upon the jury trying the case. . . . In deciding the case before them, the jurors almost invariably assumed as a matter important to their status that they knew more about the facts of the case than any newspaper reporter and that their superior understanding was due to their close observation of the trial itself.<sup>9</sup>

Also, when the media report little more than what jurors hear at trial, prejudicial influence is improbable. It is only with the publication of highly inflammatory commentary or facts that are deemed inadmissible as evidence at trial that a real problem of media influence may exist. Such could be the case with publicity about a coerced confession or about a criminal defendant's unsavory past, but cases involving such volatile information are relatively rare.

Therefore, the news media understandably protested when the justice system, following the *Sheppard* decision, began to effect sweeping restrictions on reporting.

## THE AFTERMATH OF *SHEPPARD*

One of the most notable developments in the years immediately following *Sheppard* was the 1968 adoption by the American Bar Association of detailed standards for the courts. The highly restrictive standards, which were based on a



two-year ABA study called the *Reardon Report*, were not legally binding. But they served as a model for the states and became working standards for many courts and lawyers.

Under the ABA standards, the flow of information to the media from law enforcement officers, lawyers, witnesses, and other participants in the judicial process was greatly restricted from the time of arrest until the end of trial. Many kinds of information, such as prior criminal records of defendants, were not to be released to the media under any circumstances by participants in judicial proceedings. Beyond these prohibited kinds of statements, most other statements to the media were forbidden if there was “a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.”<sup>10</sup> (These fair trial standards have since been revised by the ABA in recognition of greater First Amendment rights of witnesses and others to speak publicly.) The original standards also urged judges to use their contempt powers broadly to enforce the rules of silence upon the justice system participants.

The ABA standards never attempted to impose prior restraints directly on the media, as they did upon the media’s sources. But the standards did authorize judges under certain circumstances to choke off media access by closing preliminary and pretrial hearings and by sealing court records. Soon judges were treading even beyond the ABA recommendations, however. It became fashionable to close hearings and even trials, and judges began issuing restraining orders directly upon the media.

Two positive results came out of all this. One was increased incentive on the part of the media to participate in the bench/bar/media committees mentioned earlier in this chapter and to seek some middle ground. More than half of the states have such committees at the state level that meet with widely varying degrees of formality and frequency. Most statewide committees have even established voluntary, written bar/press guidelines of their own.

The second positive result of the court’s clampdown on publicity was that the U.S. Supreme Court entered the free press/fair trial controversy again, this time to come to the rescue of First Amendment rights.

## GAG ORDERS AND THE FIRST AMENDMENT

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In the years following *Sheppard*, trial judges produced a wave of restrictive orders to guard against prejudicial publicity. Most orders, sometimes called **gag orders**, barred lawyers and other trial participants from commenting publicly about a case. These were only indirect restrictions on the media, by way of potential sources. If the media did obtain information, they were not legally prohibited from publishing it. But a worrisome number of orders did take the form of direct restrictions on media publication.

## GAGGING THE MEDIA

Prior restraints were discussed in Chapters 2 and 3. In the Pentagon Papers case, for example, the Supreme Court indicated that the government bore the heavy burden of showing a legitimate national security threat before freedom of speech could be restrained on that ground. But what about instances in which the argument for prior restraint is linked to another provision in the Bill of Rights—the guarantee of an impartial jury? Must the doctrine against prior restraint yield?

### **The Nebraska Press Case**

That was the question that came before the Supreme Court in *Nebraska Press Association v. Stuart*. Six members of a family had been slain in a Nebraska town of about 850 people. Charged with the crimes was an unemployed handyman who confessed to law enforcement officers. The case attracted widespread media coverage, both locally and nationally.

The defendant's lawyer and the prosecutor jointly requested a court order restricting the public disclosure of evidence prior to trial. In its final form, the order barred media publication or broadcast of information about confessions or any other facts "strongly implicative" of the defendant.

A unanimous U.S. Supreme Court ruled that the gag order was unconstitutional. In the majority opinion, Chief Justice Burger summarized the Supreme Court's earlier efforts to protect a defendant's right to a fair trial from widespread publicity. But he also referred to the Court's earlier rulings on prior restraint, writing: "The thread running through all the cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."<sup>11</sup> And those restraints are particularly harmful, said the Court, when they fall upon the dissemination of news and commentary about current events, including reports of criminal proceedings.

With this in mind, the Court constructed a classic balancing test. Gag orders aimed at media coverage of legal proceedings could be constitutionally valid only in extremely rare circumstances, when the trial judge specifically finds that

1. Pretrial publicity about the case would be intense and pervasive.
2. No alternative measures would work to offset the effects of the publicity.
3. A gag order on the media would indeed operate to prevent the danger of prejudicial influence.

Furthermore, the opinion stated as an absolute rule that there may be no prior restraints on reporting what transpires during open court proceedings.

According to the Supreme Court, the trial judge in the *Nebraska Press* case was justified in concluding there would be pervasive pretrial publicity. But the judge failed to determine whether alternative measures, such as a change of venue, might have protected the accused's right to a fair trial. Furthermore, whether the

gag order would really work to guarantee an impartial jury was far from clear, the Court held.

In his concurring opinion, Justice White expressed doubt that a similar gag order on the media would ever be justifiable. And in fact, a line of later cases confirms that *Nebraska Press* left very little room for gag orders on media publicity related to judicial proceedings. The majority opinion concluded: “We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact.”<sup>12</sup>

### **Alternative Measures**

*Nebraska Press* all but sounded the death knell for gag orders on the media. In the years since the decision, trial judges usually have refused to issue gag orders, and when they have, the orders typically have been reversed on appeal. Instead, trial judges must look to one or more alternative means of ensuring a fair trial—means that do not conflict with the First Amendment. Following are some of these traditional alternatives:

1. **Continuance**—delaying trial until prejudicial publicity has died down
2. Change of venue
3. Intensive **voir dire**—questioning potential jurors to determine whether they have been prejudiced by news coverage
4. **Jury admonitions**—instructing jurors, for example, not to read or listen to media accounts of the case
5. **Sequestration** of the jury—providing a monitored place for jurors to stay for the duration of the trial, so they will not be exposed to news reports

Of these, the first three are most appropriate for diminishing the effects of pretrial publicity. Jury admonishment and sequestration are available only after a jury is selected, and they are most likely to work against any effects of publicity concurrent with the trial.

### **Sample Cases**

The approach of appellate courts following *Nebraska Press* is illustrated in the 1984 case of *C.B.S. v. U.S. District Court*. Auto industry executive John DeLorean was being prosecuted on drug charges, and before the trial CBS obtained copies of videotapes the government had made while DeLorean was under surveillance. On a Saturday the trial judge issued an order restraining CBS from disseminating any portion of the tapes. But on Sunday a Court of Appeals panel invalidated the order. Following the *Nebraska Press* test, the court said the trial judge improperly concluded that the publicity would be pervasive enough to warrant a gag order. “If it is to be restrained,” the appeals court ruled, “the publicity must threaten to prejudice the entire community so that twelve unbiased jurors cannot



### Is the Gag Order Constitutional?

- Would media publicity relating to a case surely be intense and pervasive?
- Would no alternative measures (e.g., change of venue) adequately protect against the prejudicial effects of media publicity?
- Would this gag order on the media indeed prevent the danger of prejudicial influence?

be found.”<sup>13</sup> It was unlikely that broadcasting portions of the tapes would produce such a community-wide inflammatory effect, said the court, especially in such a large, heterogeneous area as Los Angeles, the trial site. The trial judge also failed to give sufficient consideration to the second part of the test, the alternatives. Extensive use of voir dire and emphatic jury instructions were reasonable alternatives in this case, the appeals court said.

Similar scrutiny is given to gag orders in civil cases, where it is often litigant privacy, rather than Sixth Amendment rights, that is at stake. For example, in 1994 Procter & Gamble Co. sued the Bankers Trust Co., alleging a \$100 million loss because of fraud. The case was covered widely in the business press. Therefore, during the lawsuit’s discovery phase the judge stipulated that many of the documents collected would be labeled confidential trade secrets and placed under seal. Months later, the parties alerted the judge that *Business Week* magazine had somehow obtained litigation documents that the parties wanted to keep secret. The judge issued a gag order prohibiting *Business Week* from publishing the documents. But a federal appeals court held the gag order unconstitutional. The documents in question were standard litigation filings, and the court said: “The private litigants’ interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint.”<sup>14</sup>

Students should not conclude, however, that gag orders on the media are now ancient history. A majority of the Supreme Court left the door ajar for gag orders under rare circumstances, so not only do trial judges still issue them occasionally, but they also are sometimes upheld on appeal.

For example, in 1998 the Supreme Court of South Carolina upheld a gag order on the following facts: A man indicted for several violent crimes was awaiting a trial in which the state sought the death penalty. While he was in prison, a confidential conversation between the defendant and his lawyer was secretly videotaped and then provided to WIS-TV in South Carolina. Upon learning this, the defendant sought a restraining order to prevent the tape’s broadcast. The trial court issued the restraining order, prohibiting the station and other local media from airing the tape until after a jury was impaneled and sequestered in the defendant’s case. The state’s high court applied the *Nebraska Press* balancing test

and concluded that the prior restraint was justified. First, the court concluded the tape would generate pervasive and damaging pretrial publicity. Second, though other measures might have lessened prejudice to the defendant, they would not be enough to ensure him a fair trial in the face of damaging details from the attorney–client conversation. And third, the restraint on speech was narrowly tailored in time and scope and was effective in preventing potential jurors from learning about the private prison conversation.<sup>15</sup>

In 1990 the U.S. Supreme Court revisited the gag order issue in an unusual case that also involved tapes of jailhouse conversations. It concerned Cable News Network (CNN) and the criminal prosecution of deposed Panamanian dictator Manuel Noriega. CNN had obtained by legal means tape recordings of Noriega’s telephone conversations with his defense attorneys. Noriega was in jail awaiting trial on drug charges, and the jail routinely recorded inmates’ phone calls.

Upon learning that CNN planned to air excerpts, Noriega’s lawyers asked for a court order prohibiting CNN from airing any attorney–client conversations. A federal judge issued a temporary restraining order and also ordered CNN to turn the tapes over to the judge so that he could determine whether their broadcast would impair the attorney–client privilege. CNN immediately appealed, but in the meantime it also aired excerpts from one tape. In its appeal to the Supreme Court, CNN argued that the gag order was improperly based on mere speculation of harm. The Supreme Court, however, refused to lift the lower judge’s order. This essentially forced CNN to turn the tapes over to the district judge for review, which it did. The judge then determined that broadcast of the remaining unaired conversations would not threaten the attorney–client privilege, and the gag order was lifted.<sup>16</sup> Though the broadcast ban was ultimately dissolved, this case was a warning that the Supreme Court does not view gag orders as unconstitutional *per se*.

### **The Case of Kobe**

One of the highest-profile gag orders in recent years came from the 2004 sexual assault prosecution of professional basketball star Kobe Bryant. During closed pretrial proceedings, the judge heard details about the accuser’s sexual history to determine if any such information later would be allowed as evidence in open court. When a court employee mistakenly “hit the wrong button,” transcripts from the confidential proceeding were e-mailed to a list of news media rather than to the intended list of authorized attorneys in the case. Upon realizing the mistake, the court employee immediately notified the judge, who in turn promptly issued an order to the media recipients warning them not to disseminate any of the material, on penalty of contempt.

The media argued that from the moment the transcript was sent to their computers they were in lawful possession of the information and were entitled under the First Amendment to publish it if they wished. The situation was similar, they believed, to that confronted by the U.S. Supreme Court in *Florida Star v. BJF*,

discussed in Chapter 5. In that case, you may recall, the Court held that a newspaper could not be punished for running the name of a rape victim which the paper obtained lawfully from public police documents.

But in *People v. Bryant*,<sup>17</sup> the Colorado Supreme Court distinguished the transcript situation from the facts in *Florida Star*. The court noted that the electronic transcripts were not made publicly available and also said that a rape victim's sexual life is even more private than her identity. Therefore, keeping the transcripts confidential was a state interest of the "highest order," the Colorado court concluded. And there was no significant public purpose served by making the information public. Therefore, the court upheld the gag order. Shortly thereafter the dispute became moot because the trial judge ruled that much of the information from the closed proceeding could be publicly introduced at trial, and then the prosecution against Kobe Bryant was dropped.

### **Website Comments**

One of the most troublesome developments in communications law has been over the rise of user-generated content on websites. Not only can it raise the risks of defamation and privacy lawsuits, but such content is also a potential threat to fair court proceedings.

For example, in 2009 Knoxville, Tennessee was preparing for the death-penalty trials of four suspects in the brutal torture and slaying of a young couple. As the date for jury selection approached, defense attorneys were concerned about hostile, published comments concerning the case and about the defense lawyers themselves. The alarming commentary was coming not from professionals in the media but from public comments on the local media's websites.

Attorneys for all four defendants asked Criminal Court Judge Richard Baumgartner to issue a restrictive order directing local media to shut down website comments about the case, or at least the anonymous comments. The unusually harsh comments would threaten the ability to find impartial juries, they argued. But some weeks later the judge declined to issue the requested order. He noted that other measures were available to ensure an impartial jury, that the order might be ineffective because so many other Internet avenues existed for public comment, and that the order would likely amount to an unconstitutional prior restraint on the local media.<sup>18</sup>

## **GAGGING TRIAL PARTICIPANTS**

Although direct gag orders on the media now have only a narrow window of constitutional support, the Supreme Court has more readily supported restrictive orders on out-of-court statements by *participants* in legal proceedings. These participants include plaintiffs and defendants, lawyers, witnesses, jurors, and court officials. The Supreme Court's endorsement of gag orders on participants came more than twenty-five years ago in the *Sheppard* case, and many state

and federal appellate courts have upheld such orders when they are aimed at preventing prejudicial statements that are not already part of the public record.

Some limits also apply to participant gag orders, however, because modern courts have recognized that the participants, too, have free speech rights that must be weighed. To avoid constitutionally overbroad gag orders, some appellate courts have required a showing by the trial judge that the prohibited statements would pose a clear and present danger to a fair trial and that reasonable alternatives to the gag order do not exist. Others have adopted the standard of a reasonable likelihood of a serious threat to a defendant's right to a fair trial. The bottom line here is that gag orders on participants are upheld fairly often, but only if the orders are narrowly tailored and accompanied by some specific justification.

For example, such a restrictive order was upheld during the 1997 trial of Timothy McVeigh, a suspect in the bombing of the Oklahoma City federal building two years earlier. The bombing killed 168 people and injured hundreds more. Media coverage was so intense that it compelled the unusual step of a change of venue from Oklahoma to Colorado. But before the jury was selected, the trial court took the additional step of restraining all out-of-court statements about the case by the lawyers and other support personnel in the trial. The step was necessary, the court said, to keep jurors from being exposed to misleading, out-of-court pronouncements by lawyers in the highly complex and emotionally charged case.<sup>19</sup>

### **Lawyers' Rules of Conduct**

In some states enforceable disciplinary rules work as a partial gag on attorneys in all cases, even without an individual tailored order from a judge. These rules, many of them modeled after Rule 3.6 of the American Bar Association's *Model Rules of Professional Conduct*, may discourage lawyers from cooperating with the media.

ABA Rule 3.6 forbids a lawyer to make a statement to the media if the lawyer "reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."<sup>20</sup> The rule goes on to list several kinds of statements that would ordinarily be deemed prejudicial, including comments relating to the reputation of a party or witness or their expected testimony, the existence or substance of a confession, the results of any examination or test, and even the fact that a person has been charged with a crime. About half the states have adopted some version of Rule 3.6. Lawyers who violate the rule are subject to disciplinary action. In one example, following the arraignment of his client on felony theft charges, a Nevada lawyer had held a press conference in which he declared his client innocent and questioned the integrity of people who had testified before the grand jury. The Nevada Bar later disciplined the attorney for violating Nevada Supreme Court Rule 177—a provision nearly identical to ABA Rule 3.6—that prohibited lawyers from making out-of-court statements that the

lawyer should know “will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”

In 1991 the U.S. Supreme Court gave its general approval to disciplinary rules that limit lawyers’ out-of-court comments, but invalidated Nevada’s version of the rule. The Court agreed that lawyers may be subject to speech restrictions more stringent than restraints on the media or the public. In the Nevada case, though, the wording of the rule was not specific enough to give lawyers clear notice of the kinds of remarks that would be considered a violation. Therefore, the Court held, the rule was unconstitutionally vague.<sup>21</sup>

### **Media as Participants**

When a mass medium itself is a party to a lawsuit, it may encounter an exception to the tough standard against gag orders on the media. The exception was set down by the Supreme Court in *Seattle Times Co. v. Rhinehart*,<sup>22</sup> a 1984 case, and it pertains to media dissemination of information obtained in the civil discovery process.

The *Times* and other newspapers were defendants in a libel and privacy lawsuit filed by members of a small religious group that the papers had been investigating. The papers’ lawyers then made extensive use of the civil discovery process to obtain information about the group. But a Washington state court issued a protective order prohibiting the papers from publishing anything they learned solely through the court-supervised discovery process. The U.S. Supreme Court unanimously affirmed. The Court noted that discovery is a powerful tool for litigants—essentially a court-compelled intrusion into normally confidential matters. The protective order was justified, the Court ruled, to prevent media abuse of this process for journalistic purposes.

## **ACCESS TO PROCEEDINGS**

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The case of *Sheppard v. Maxwell*, you’ll recall, involved not only problems of trial and pretrial publicity but also of disruptive media conduct at the trial. To prevent this threat to proper decorum, as well as some of the perceived publicity problems, it was logical that trial judges in the late 1960s began using another remedy with increasing frequency: the closed courtroom.

Constitutionally speaking, it is also the general rule that government is free to deny access to the media and public so long as the denial is non-discriminatory. (This rule was discussed in Chapter 6.) Therefore, closing court proceedings, though contrary to the courtroom tradition in this country, was not regarded as a violation of the media’s First Amendment rights.

That changed in 1980, however, with a series of Supreme Court opinions that dealt directly with the problem of closed criminal proceedings. The public



and the media now have a recognized, albeit qualified, First Amendment right to attend proceedings in a courtroom.

## CRIMINAL TRIALS

The landmark case for courtroom access rights was *Richmond Newspapers, Inc. v. Virginia*. The story began in 1976 when John Paul Stevenson was prosecuted in the stabbing death of a hotel manager in Virginia. Stevenson was tried and convicted of second-degree murder. But the Virginia Supreme Court reversed the conviction on grounds that a bloodstained shirt had been improperly admitted as evidence. A second trial began, but it was declared a mistrial when one of the jurors suddenly had to be excused. A third attempt also ended in a mistrial when it was learned that one of the prospective jurors had read newspaper accounts of Stevenson's prior trials and had told other prospective jurors about the case.

As the fourth trial was set to begin, Stevenson's lawyer requested that the trial be closed to the public. (The Sixth Amendment guarantees criminal defendants a right to a public trial, but defendants may waive this right.) The defense attorney said he was concerned that courtroom spectators might relay accounts of testimony to prospective witnesses. The prosecutor did not object to the motion for closure, and the judge ordered the courtroom closed to all spectators. The order was not immediately contested by the two reporters present, representing the *Richmond Times-Dispatch* and the *Richmond News-Leader*. Later that day, however, Richmond Newspapers obtained a hearing to attack the closure order. Lawyers for the reporters argued that the judge failed to consider less drastic measures before ordering the closure. But the judge left his order in place, stating that "having people in the courtroom is distracting to the jury."<sup>23</sup> The trial continued the next morning with the public and press excluded.

The trial ended swiftly, this time with the verdict that Stevenson was not guilty. Though the homicide case was now over, Richmond Newspapers continued to seek a legal determination that the closure had been unlawful. Eventually the matter reached the U.S. Supreme Court, and the Court ruled 7–1 in favor of the newspapers. For the first time, the Court had found a specific right of access under the First Amendment. For its efforts in championing access to the legal system, Richmond Newspapers was awarded the Society of Professional Journalists' prestigious Freedom of Information Award in 1982.

### ***The Richmond Rationale for Access***

Why should a constitutional right of access apply to criminal trials when such a right has not been declared for other government places or forums? In the Court's plurality opinion, Chief Justice Burger stressed two things. One was historical context: Trials traditionally have been open to the public for hundreds of years.

Second, Burger noted an important function of openness: The openness of trials had long served a vital purpose by providing an outlet for community concern, hostility, and other emotions triggered by crime. In modern society, he said, the mass media, operating as “surrogates for the public,” relay the important trial information to the people. And this information is essential to public confidence in the judicial system. Having made these historical and functional arguments (now sometimes referred to as the “experience and logic” test), the chief justice concluded that “a presumption of openness inheres in the very nature of a criminal trial under our system of justice.”<sup>24</sup> Then he gave that presumption constitutional stature:

Free speech carries with it some freedom to listen. . . . What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted. . . .

We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.<sup>25</sup>

Justice Burger concluded his opinion by observing that, in this case, the trial judge had made no specific findings of a threat to a fair trial, nor did he investigate whether alternative solutions could have ensured fairness. Therefore, the closure was improper: “Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.”<sup>26</sup>

The chief justice declined, however, to specify the kinds of circumstances that could override the public’s newfound right of access. This imprecision in the plurality opinion was exacerbated by the seven separate opinions the justices produced in the case—opinions that evidenced significant differences of thinking about the breadth of this First Amendment right and the constitutional standard for overriding it.

Nevertheless, the case was remarkable in that it added a whole new arm to the First Amendment. The significance was underscored by Justice Stevens in his own opinion: “Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.”<sup>27</sup>

### ***Case-by-Case Scrutiny of Closures***

The Supreme Court further solidified this First Amendment right of access to criminal trials in the 1982 case of *Globe Newspaper Co. v. Superior Court*.<sup>28</sup> The Court in that case struck down a Massachusetts statute that required

closure of trials during testimony by juvenile victims of sexual offenses. Justice Brennan, writing for the majority, reiterated the constitutional access rationale of *Richmond Newspapers* and then went a step farther by ruling that a strict scrutiny standard of review would apply to courtroom closures. To be constitutional, a trial closure must be supported by a compelling government interest, and the closure must be narrowly tailored to serve that interest, the Court ruled in *Globe*.

The Massachusetts statute aimed to protect juvenile victims from further trauma, embarrassment, and intimidation, and the Court ruled that this was indeed a compelling interest. But the statute was not narrowly tailored. It categorically closed all such testimony, whether or not the victim actually needed such protection. A less sweeping, discretionary closure rule, rather than a mandatory one, could satisfy the state's goals.

Justice Brennan emphasized that the *Globe* ruling was a narrow one. It did not mandate open trials at all times. In fact, one of the commonly accepted justifications for closed trials is the protection of juvenile crime victims and witnesses from further trauma and embarrassment, especially in sex offense cases. But *Globe* suggests that such trial closures must be justified on a case-by-case basis, with the trial judge considering such factors as the victim's age and maturity, the nature of the crime, and the victim's desires regarding closure. (In the *Globe* case, for example, the victims were sixteen and seventeen and indicated no qualms about testifying in public.) Many lower court decisions have since employed the constitutional test articulated in *Globe* and have upheld partial closures of trials to protect the psychological well-being of juvenile crime victims or witnesses.

### ***The Jury Selection Phase***

Later opinions by the Supreme Court added further detail to the test for determining when courtroom closures are constitutional, and they also expanded the test's application. In 1984 the Supreme Court held unanimously that the public access rights apply even to the jury selection phase of a criminal trial. The case was *Press-Enterprise Co. v. Superior Court* (often called *Press-Enterprise I*).<sup>29</sup> A man was charged in the rape and killing of a teenage girl. The trial judge in the homicide case had excluded the public from the lawyers' questioning of prospective jurors, one of the earliest phases of a trial. The stated purpose of the closure was to encourage candor in the prospective jurors' responses by protecting against public disclosure of sensitive answers. But the Supreme Court held that jury selection was a critical part of the trial process and was subject to the same presumption of openness as the main portion of the trial. In this instance, the trial judge had failed to articulate specific dangers and had not considered whether less drastic measures might have worked to protect jurors' privacy. Therefore, the closure order was vacated.



### ***Must a Court Proceeding Be Open?***

- Has this kind of proceeding historically been open to the public?
- Does public access play a key role in the functioning of this kind of proceeding?
- If “yes” to both of the above, then a qualified First Amendment right of access applies. The proceeding may be closed only if
  - There is a substantial probability that openness would jeopardize a fair trial or cause other serious harm.
  - There are no reasonable alternatives to closure.
  - The closure is narrowly tailored.

What has evolved from *Press-Enterprise I* and later cases is essentially a four-pronged test. Criminal trial closures will be constitutional only if all of these conditions are met:

1. A substantial probability exists that overriding interests (such as the accused’s right to an impartial jury) will be damaged by conducting the proceeding in public.
2. No reasonable alternatives to closure would protect against the danger.
3. The reasons behind these conclusions are fully articulated as findings in the trial record.
4. The closure is no broader than necessary to protect the overriding interest.

The final prong of this test means that, even when some form of closure appears warranted, judges must take care to fashion the closure as narrowly as possible in order to avoid undue harm to the First Amendment access rights of the public and media. Therefore, closure orders usually are limited to isolated segments of the proceedings—during testimony of a particular witness, for example.

What about the closed courtroom you encountered in the chapter Hypothetical? All you were told was that the judge anticipated substantial distractions if the courtroom were open to journalists. First, you should wonder whether specific findings were articulated to support this closure. If not, the closure could be vacated by a higher court on that basis alone. What is the likelihood that the judge could articulate a specific finding of likely danger to a fair trial? Pretty slim, it seems, because the judge would not yet have known how many reporters would attend the trial or how respectful they would be of the trial process. And even if the judge did have sufficient evidence to find a likelihood of danger, could the danger reasonably be diffused by alternative measures or by a more selective closure? This was a closure that a good journalist would not fail to protest.

Briefly, U.S. Supreme Court rulings during the 1980s greatly curtailed closures of criminal trials, just as gag orders on the media were reined in during the 1970s. Again, closures are not banned altogether, but a strict constitutional standard—one that mandates a look at alternatives—makes valid closures extremely rare.

## PRETRIAL PROCEEDINGS

Criminal trials actually are but a small part of the overall criminal justice process. Another significant aspect of the system involves pretrial proceedings of many types, such as arraignments, bail hearings, and hearings to suppress the release of certain kinds of evidence. Therefore, as the Supreme Court was molding a First Amendment right of access to criminal trials, the question naturally arose whether the right would apply to these other proceedings as well.

In 1986 the Supreme Court began to answer this question by extending the qualified right of courtroom access to preliminary hearings—at least as they are conducted in California. In a preliminary hearing, the criminal defendant is confronted with a streamlined version of the prosecution's evidence, and the defense is allowed to cross-examine the prosecution's proposed witnesses. The purpose of the hearing is for the judge to determine whether evidence sufficient to warrant a full-fledged trial exists against the accused. The preliminary hearing is thus an important stage that may last many days.

In a case again titled *Press-Enterprise Co. v. Superior Court*, often referred to as Press-Enterprise II, the U.S. Supreme Court ruled against closure of a particularly lengthy preliminary hearing in California. A nurse named Robert Diaz was accused of killing twelve patients by administering massive doses of a cardiac drug, and the prosecution was seeking the death penalty. Naturally the case attracted national publicity, and the defense requested that the preliminary hearing be closed. The judge agreed, citing a danger that “only one side may get reported in the media.”<sup>30</sup>

But the Supreme Court found a long tradition of accessibility to preliminary hearings as conducted in California. It also found that public access served a significant, positive function in these hearings, which resemble trials in many ways. Access serves as a safeguard against corruption and also as a bridge to public confidence in the system. Essentially the same considerations that led to a First Amendment right of access to criminal trials in *Richmond Newspapers* were present in this case, and the Court appropriately extended the right.

After concluding that the right of access extended to California preliminary hearings, the Supreme Court in *Press-Enterprise II* applied the four-part test from *The Court* ruled that the test had not been met and struck down the closure.

*Press-Enterprise II* was an encouraging decision for journalists, though it inspired much speculation regarding just how far the qualified First Amendment right of access would go. It was unclear whether the right could extend to virtually

## EXHIBIT 7.1 Access to Courts: Key Supreme Court Cases

- 1966** Criminal convictions will be overturned if trial judges fail to “take strong measures” to ensure an impartial jury free from outside influences (*Sheppard v. Maxwell*).
- 1976** Judicial gag orders on the media are valid only in rare circumstances where no other measure exists to control pervasive and prejudicial publicity (*Nebraska Press Association v. Stuart*).
- 1980** The public and the media have a First Amendment right of access to criminal trials, absent an overriding justification for closure (*Richmond Newspapers v. Virginia*).
- 1981** Media cameras in the courtroom, if properly controlled, do not violate a criminal defendant’s right to a fair trial (*Chandler v. Florida*).
- 1986** The First Amendment right of access extends beyond criminal trials to other proceedings with a tradition of openness and where public access serves an important function—in this case criminal preliminary hearings (*Press-Enterprise v. Superior Court [Press-Enterprise II]*).

all pretrial and post-trial hearings in criminal cases. Furthermore, the Supreme Court could apply its *Richmond Newspapers* tradition-and-function test to other kinds of justice-related proceedings, potentially finding a First Amendment right of access to such things as civil case proceedings, congressional hearings, and administrative hearings. The Supreme Court has not squarely revisited the issue. Among the lower federal courts that have wrestled with these questions, however, the general trend has indeed been to extend the qualified First Amendment access right. See Exhibit 7.1 for a list of key Supreme Court cases pertaining to courtroom access.

## EXECUTIONS

From the early days of this nation until the early 1900s, executions customarily were public events, often witnessed by hundreds of people. Today, however, this most severe stage in the justice system often presents access frustrations for journalists. The federal government and about three-quarters of the states permit executions, but typically under very tightly controlled conditions, with a limited number of witnesses. State statutes or prison regulations often specify the makeup of witnesses, sometimes mentioning the media and sometimes not. And some portions of the execution process may be carried out entirely in secret.

The Ninth Circuit Court of Appeals has added a new First Amendment component to this discussion with its 2002 ruling in *California First Amendment Coalition v. Woodford*.<sup>31</sup> In California, executions are carried out at a state prison, in a sealed chamber with windows facing an adjoining room that accommodates fifty witnesses. About twenty-five minutes before the execution by lethal injection, guards escort the condemned to the chamber and secure the prisoner to a gurney with straps. Medical technicians insert and test intravenous lines and then leave the chamber. The warden then gives the order to dispense a progression of chemicals to produce unconsciousness and stop the lungs and heart.

Historically, during the sixty-year era of executions in a gas chamber, the public and media witnesses were allowed to see the entire process, from the moment the prisoner entered the chamber. But when California's execution process changed to lethal injection, the prison adopted a rule prohibiting witnesses from observing the process until after intravenous lines were inserted and the guards and technicians had left the chamber. Only then were curtains raised on the chamber windows. The California First Amendment Coalition and the Society of Professional Journalists sued for an injunction to ensure witness observation from at least the time the prisoner is first strapped to a gurney until just after death.

The Court of Appeals applied the Supreme Court's two-pronged *Richmond Newspapers* test and concluded that a First Amendment right of access applies to executions and to the full execution procedure. The process had been routinely open historically, the court said, and public access plays a key role in ensuring proper functioning of executions. The court then held that the prison's limited-time witness rule did not serve an overriding government interest. Rather, it was an "exaggerated response" to concerns about security. No evidence suggested that the rule was necessary to prevent prison staff from being identified and attacked. But the rule did seriously interfere with the public's ability to observe the prisoner's demeanor and the staff's degree of competence in carrying out the death sentence. Therefore, an injunction to force access to the full procedure was affirmed.

Keep in mind, however, that this case did not concern a right to photograph or record the execution. News media have occasionally sought to bring cameras or even to televise executions, but the courts have sided with prison policies against cameras.<sup>32</sup>

## CIVIL PROCEEDINGS

So far we have looked at courtroom closures only in the context of criminal cases. The issues and litigants in civil proceedings may also be of great news value, however. Although the Sixth Amendment right to an impartial jury does not apply to civil cases, a fair jury in civil cases is guaranteed under common law and state constitutions. Also, other important interests—such as privacy rights and trade secrets—sometimes work against openness.

The U.S. Supreme Court has not decided directly whether the right of access recognized in criminal proceedings also extends to civil cases. However, the plurality opinion in *Richmond* noted that both criminal and civil trials historically have been open in this country from the time of the ratification of the Constitution. And a few of the justices in their *Richmond* concurrences suggested that the rationale behind the right of access would apply to civil trials as well.

Therefore, lower courts directly confronting the issue in recent years have tended to hold that a constitutional right of access applies to civil trials.<sup>33</sup> And in some instances in which the courts have declined to find a First Amendment

access right, they nevertheless have ruled in favor of access based on a common law presumption of openness.<sup>34</sup>

### ***Privacy Interests***

On the other hand, some courts have balked at extending access rights to certain classes of civil proceedings in which privacy interests typically are high. This is true primarily with family relations cases, involving such matters as divorce and child custody, and with mental health proceedings. In upholding closures, courts often note that family law proceedings do not have the same tradition of openness as do most other kinds of court proceedings. In fact, many kinds of family law proceedings historically have been closed to the public by state statutes. Still, the Supreme Court's ruling in *Globe Newspaper* would seem to preclude blanket closures and require judges to assess the need for closure in each case.

### ***Civil Discovery and Settlement Proceedings***

The presumption of openness that now applies to most civil trials and hearings does not extend, however, to the pretrial discovery phase of civil lawsuits. During discovery, the litigants attempt to collect all pertinent information about the case—from potential witnesses and from each other—by asking many detailed questions, often in live depositions, and by requesting documents. The responses are mandated by law and made under oath. This phase may last many months or even years, and its goal is to clarify the issues for trial. The discovery phase may produce reams of information that are never actually presented as evidence at trial.

Because of the expansive and unfiltered nature of the civil discovery process, courts typically have declined to grant media access rights to depositions or the lawyers' extensive discovery files. Note, however, that if litigants voluntarily provide the fruits of discovery to you, you have a First Amendment right to disseminate that information (though subject to the usual tort restraints, such as invasion of privacy). Some kinds of discovery documents are routinely made part of the public file, open for inspection at the courthouse.

Similar to the discovery steps, settlement proceedings are a critical part of most civil cases. Frank and open discussion that leads to a settlement is usually considered preferable to an expensive, public trial. But to help ensure productive settlement discussions, these sessions are closed to public and media access. Furthermore, the resulting terms of settlement often are kept confidential, by agreement of the parties.

## **DEPORTATION HEARINGS**

On September 21, 2001, the nation's chief immigration judge, under authorization of U.S. Attorney General John Ashcroft, designated certain deportation hearings



to be “special interest” cases that must be conducted in complete secrecy. The cases concerned deportation of noncitizens who the government believed might have connections to terrorist organizations or activity, perhaps even to the attacks of September 11, 2001. Immigration matters are the domain of the political branches of government. Congress has full authority to set the conditions for entry to the United States, and deportation proceedings are administrative (sometimes called “quasi-judicial”), handled by the executive branch of government. So the judiciary generally would have nothing to say about the substance of such proceedings.

But several media filed lawsuits, claiming a constitutional right to attend the newsworthy hearings. And this was a matter within the dominion of the courts. More specifically, the question was whether the public and the media have a First Amendment right to attend deportation hearings conducted by the executive branch.

In two different cases in 2002, in two different federal appellate circuits, the courts reached different conclusions. In *Detroit Free Press v. Ashcroft*, the Sixth Circuit applied the two-pronged test of *Richmond Newspapers* and determined that a First Amendment right of access exists. Deportation hearings are clearly adversarial proceedings similar to civil trials, the court said, with a similar tradition and need of openness. Furthermore, the court held, “While we sympathize and share the Government’s fear that dangerous information might be disclosed in some of these hearings, we feel that the ordinary process of determining whether closure is warranted on a case-by-case basis sufficiently addresses their concerns.”<sup>35</sup> The court affirmed an injunction to keep the hearings open.

In *North Jersey Media Group v. Ashcroft*, the Third Circuit agreed that formal deportation hearings resembled civil trials in many respects. But in its application of the *Richmond Newspapers* test, the court said the tradition of openness for deportation hearings was weak, not comparable to judicial trials. Further, on the function prong of the test, the court criticized the Sixth Circuit for listing only the positive aspects of openness. For this class of special hearings, the court said, the value of openness was offset by the possibility that openness would impair the greater public good by making sensitive information available to dangerous people. The court therefore held that no First Amendment right of access existed.<sup>36</sup>

## SPECIAL PROBLEM: JUVENILE COURT

In contrast to most other kinds of court proceedings, the proceedings in juvenile court—where persons under age eighteen are prosecuted—have traditionally been closed to the public in order to protect the anonymity of the defendant. Behind this tradition is the notion that the juvenile justice system is not intended primarily to punish but rather to rehabilitate immature offenders. Publicity can hamper rehabilitation, the theory goes, because juveniles are stigmatized when their names and crimes are made known to the community at large.

Because juvenile court has traditionally been closed, it is uncertain whether any First Amendment right of access might apply to these proceedings. The U.S. Supreme Court has not directly addressed the issue. And, meanwhile, other courts have upheld continued closure. For example, the Supreme Court of Vermont in 1981 held that the First Amendment right of trial access announced in *Richmond Newspapers* did not apply to juvenile court proceedings.<sup>37</sup>

But recent years have seen a troublesome rise in juvenile crime rates and high-profile violent crimes by juveniles that have sparked a change in public attitude. The public is demanding closer scrutiny of the juvenile justice system, and many would say the public's right to know about violent juvenile crimes should override the young offender's right to rehabilitate in privacy.

Therefore, many states are revising their statutes to open juvenile court proceedings and records in certain instances—such as when the offender is thirteen or older and the offense would constitute a violent felony. Furthermore, in many jurisdictions judges have the discretion to open juvenile court proceedings under certain conditions—such as when the media agree in advance not to reveal the minor's identity. Examine your own state's statutes and case law and keep in mind that the law of access to juvenile court is in a state of significant change.

Also, remember that even in states that strictly limit access to juvenile court proceedings and records, the media cannot be punished for revealing juvenile information they lawfully obtain in another manner. This was the U.S. Supreme Court's holding in *Smith v. Daily Mail Publishing Co.*,<sup>38</sup> discussed in Chapter 5. This principle was also illustrated in a 1998 decision by the Supreme Court of Mississippi. A reporter for the *Delta Democrat Times* attended an open court manslaughter sentencing hearing. The prosecutor discussed portions of the adult defendant's prior juvenile record in order to persuade the judge to impose a harsh sentence. Following that discussion, the judge asked the reporter to approach the bench and told the reporter that the juvenile record information was "not to be recorded in the paper." But the reporter's story nevertheless contained this line about the defendant: "As a juvenile, Hollingsworth was charged with such crimes as manufacturing of marijuana, grand larceny, auto burglary, possession of alcohol and others."<sup>39</sup> The reporter was sentenced by the judge to seventy-two hours in jail for contempt. But the state's high court reversed because the reporter was not obliged to obey the judge's order not to publish. Once the confidential record was made public in open court, anyone in attendance had a right to disseminate the information.

## **SPECIAL PROBLEM: CAMERAS IN THE COURTROOM**

As shown above, courtrooms traditionally have been open to the public and the media, with the exception of a few kinds of proceedings. And in the last twenty years, the Supreme Court has declared a First Amendment right of access to accompany that tradition. On the other hand, although the courts have generally

accepted and even required a right of access for those with notepads and pens, access with cameras has been much more problematic.

Over the years, judges have abhorred both television and still photography in their courtrooms. Unlike the presence of reporters with mere notepads, the use of cameras, it was thought, presented a serious danger of (1) distracting juries, (2) intimidating witnesses, (3) encouraging “showboating” by lawyers and witnesses, and (4) generally disrupting proper decorum. These effects could jeopardize a fair trial. Furthermore, cameras were not equated with access. Cameras were not necessary for keeping the public informed about justice; they were viewed rather as devices for the showbiz side of journalism. So, for decades, most court systems across the nation maintained strict bans on the use of cameras.

### ***The Chandler Ruling***

The U.S. Supreme Court first confronted the issue in 1965. A man linked to then President Lyndon Johnson had been convicted of big-time fraud in Texas and, despite the defendant’s objections, the trial judge permitted the proceedings to be televised. Texas was one of just two states that allowed televised trials at the time. The Supreme Court later overturned the man’s conviction, ruling that the use of TV cameras had contaminated the constitutional ideals of a fair trial and due process.<sup>40</sup>

But in the years that followed, the media lobbied vigorously for the use of cameras, and technology aided the cause by providing equipment that was less conspicuous and easier to use. By the mid-1970s, the courts had begun to experiment. By 1980 a majority of the states had either lifted their bans on photography or were studying the issue.

In 1981 the U.S. Supreme Court faced the issue again in the case of *Chandler v. Florida*. The context was a criminal trial in which two Miami police officers were convicted of conspiracy to commit burglary. TV cameras had been present in the courtroom over the defendants’ objections, though only a few minutes of the trial were broadcast.

This time the Supreme Court allowed the convictions to stand, ruling that the presence of cameras does not inherently render a trial unfair. Wrote Chief Justice Burger for the majority:

An absolute Constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. . . . The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant’s right to demonstrate that the media’s coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly.<sup>41</sup>

In *Chandler* the Supreme Court made it clear that cameras in the courtroom could be constitutionally permissible. The ruling further opened the door for experimentation with cameras. Still, the Supreme Court has never ruled that access with cameras is constitutionally *required* under the First Amendment. Therefore, the various court jurisdictions—via statutes or formal court rules—have been free to set their own guidelines.

### **State Camera Rules**

Today all of the states allow cameras in their courtrooms on at least a limited basis. Televising all or portions of criminal trials is permitted in more than thirty-five states and, in most of those states, still and video cameras are also allowed in appellate proceedings. Keep in mind, however, that these state rules *permit* judges to allow camera access; they do not *require* that camera access be given. In most cases it is entirely up to the judge's discretion whether to allow cameras into his or her courtroom, and the inclination of judges to do so varies from state to state and even county to county.

The 1995 O. J. Simpson murder trial—or “spectacle,” as some called it—refocused national attention on the cameras-in-court debate. Prior to the Simpson criminal proceedings, camera access had evolved to the point of routine in many states. But the lengthy, often theatrical trial of the former football star rekindled the controversy over cameras, and the trial helped convince a few judges in other high-profile cases to deny camera access. Yet by the year 2000, there was very little evidence of turning back the clock on cameras. Most judges seemed to recognize that the theatrical O. J. case was an aberration, with or without cameras, and that cameras were presenting no problem in most courtrooms. One study in 2000 revealed that 80 percent of all TV access requests were being approved by California judges, and the percentage was even higher in Los Angeles County.

Camera access comes with some strings attached, however. Modern court rules seek a balance between journalists' legitimate photo and video needs and the parties' rights to dignified legal proceedings. For example, most modern rules reserve for judges the broad discretion to determine whether camera coverage will be allowed in a particular case, and how. States often require written judicial approval some days in advance. Some states also require permission of the parties. And, in proceedings with extraordinary media interest, the court may require a pool arrangement for all media—one or two camera people are admitted to the courtroom and then share the photos and video with the others. Some states' rules also contain specific prohibitions on close-up shots of jurors or the use of motorized drives or special lighting. Photographers are often limited to a certain area of the courtroom. Sometimes a judge will hold an open hearing regarding a camera-access request, particularly if one or more of the parties opposes the request.

As a practical matter, you might increase your chances of camera access by introducing yourself to the judge in chambers in advance of the trial or hearing.

Show the judge how your camera works and convey your appreciation for the need to be unobtrusive. Further, as court coverage will appear more and more often as streaming video on websites, you should make sure the judge is familiar with the site and exactly how the video will be displayed.

### **Federal Camera Rules**

Generally speaking, camera access rules have worked smoothly in the states, and many judges today allow camera access routinely. A major exception, however, has been the federal court system. Rule 53 of the *Federal Rules of Criminal Procedure* states: “Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.” Therefore, media covering federal criminal cases have had to rely on photos of people entering or leaving the courtroom or on artists’ sketches of the courtroom drama.

In 1991 the federal court system began a three-year pilot program that permitted camera coverage of civil proceedings in selected trial and appellate courts, at the discretion of a presiding judge. Federal courts in six states participated. The pilot program generated positive feedback from the participating judges and lawyers, who generally found the cameras to be unobtrusive. But in 1994 the U.S. Judicial Conference voted to discontinue the program and return to a system-wide ban on cameras in federal court. In 1996 the Judicial Conference again changed its mind and voted to allow each circuit to set its own camera rules, but only in civil cases. Despite these invitations to experiment, federal judges by and large have continued to oppose cameras in court, with the Second Circuit and Ninth Circuit being occasional exceptions.

The U.S. Supreme Court has yet to allow cameras in any of its proceedings. In a 1999 speech before the National Press Club in Washington, D.C., the president of the American Bar Association urged the Supreme Court to open its doors to cameras so that the public could witness the “majesty” of the American justice system. But as of 2009 the Court showed no signs of voluntarily allowing cameras.

Legislation, however, had a reasonable chance of changing the picture. The Sunshine in the Courtroom Act of 2009, introduced as H.R. 3054 and S. 657, if signed into law would authorize presiding judges in the federal district courts, the circuit appellate courts, and the Supreme Court to permit photographing, recording, or televising to the public any court proceeding. Another 2009 bill, introduced as H.R. 429 and S. 446, would go a step further with regard to the Supreme Court. As introduced, the proposed legislation read: “The Supreme Court shall permit television coverage of all open sessions of the Court unless the Court decides, by a vote of the majority of justices, that allowing such coverage in a particular case would constitute a violation of the due process rights of one or more of the parties before the Court.”

## ETHICS, ETIQUETTE, AND COURT COVERAGE

As a practical matter, and over the long term, media interests in access and publication will not be assured wholesale by the Supreme Court. Instead, the media must continually earn the confidence of judges and lawyers. This is accomplished in part by appreciating the constitutional and moral rights of those directly involved in legal proceedings. Often the media are wise (and perhaps ethically bound) to exercise a little self-restraint so that principles of justice are not trampled while guarding the public's right to know. Even when media behavior does not give rise to a question of ethics, it may nevertheless concern a point of courtroom etiquette—something that judges take seriously.

The law does not dictate most aspects of the media–justice system relationship—one reason that the dialogue encouraged by bench/bar/media committees remains so important. At the very least, these committees can foster a greater understanding by the legal profession of journalists' professional principles, and vice versa. Some committees have agreed upon statements of ethical and professional principles and even on specific, voluntary policies. Exhibit 7.2 shows the version adopted many years ago in California.

## ACCESS TO EVIDENCE AND RECORDS

With access to courtroom proceedings now guaranteed by law in most cases, the next question involves access to the court documents in those proceedings. This evolving area of law is complicated by the fact that several different kinds of records may be accumulated during a legal case. Remember, too, that state and federal open records statutes, discussed in Chapter 6, don't cover the courts.

The “Civil Discovery” section on page 273 noted the general rule that the media have no access rights to information gathered by lawyers through the pre-trial discovery process in civil cases. But some access rights do apply to actual court records. Unfortunately, the U.S. Supreme Court has provided little guidance in this area, and courts in the various states and federal circuits have conflicting views. Keep this in mind as you read the following discussion of the general trend of the opinions concerning access to judicial records.

A First Amendment right of access to judicial records has not been widely recognized. However, in both *Press-Enterprise I* and *II* the newspaper sought access to transcripts of the judicial proceedings as well as access to the actual proceedings. When the Supreme Court ruled in those cases that there existed a First Amendment right to attend the proceedings, it implicitly held that the transcripts of such proceedings must be open to public and media inspection. As Chief Justice Burger wrote in *Press-Enterprise II*: “Denying the transcripts of a 41-day preliminary hearing would frustrate what we have characterized as the ‘community therapeutic value’ of openness.”<sup>42</sup> Thus a First Amendment right of

## EXHIBIT 7.2 *Joint Declaration Regarding News Coverage of Criminal Proceedings in California*

### STATEMENT OF PRINCIPLES

The bench, bar, and news media of California recognize that freedom of the press and the right to fair trial, as guaranteed by the First and Sixth Amendments to the Constitution of the United States, sometimes appear to be in conflict. They believe, however, that if the principles of fair trial and free press are applied responsibly in accord with high professional ethics, our society can have fair trials without limiting freedom of the press.

Accordingly, the following principles are recommended to all members of the bar and the press in California.

1. The news media have the right and responsibility to gather and disseminate the news, so that the public will be informed. Free and responsible news media enhance the administration of justice. Members of the bench, the bar, and the news media should cooperate, consistent with their respective ethical principles, in accomplishing the foregoing.
2. All parties to litigation, including the state, have the right to have their causes tried fairly by impartial tribunals. Defendants in criminal cases are guaranteed this right by the constitutions of the United States and the State of California.
3. Lawyers and journalists share with the court responsibility for maintaining an atmosphere conducive to fair trial.
4. The news media and the bar recognize the responsibility of the judge to preserve order in court and to conduct proceedings in such a manner as will serve the ends of justice.
5. Editors in deciding what news to publish should remember that:
  - (a) An accused person is presumed innocent until proved guilty.
  - (b) Readers, listeners, and viewers are potential jurors or witnesses.
  - (c) No person's reputation should be injured needlessly.
6. No lawyer should use publicity to promote his version of a pending case. The public prosecutor should not take unfair advantage of his position as an important source of news. These cautions shall not be construed to limit a lawyer's making available information to which the public is entitled. Editors should be cautious about publishing information received from lawyers who seek to try their cases in the press.
7. The public is entitled to know how justice is being administered, and it is the responsibility of the press to give the public the necessary information. A properly conducted trial maintains the confidence of the community as to the honesty of its institutions, the competence of its public officers, the impartiality of its judges, and the capacity of its criminal law to do justice.
8. Journalistic and legal training should include instruction in the meaning of constitutional rights to a fair trial, freedom of the press, and the role of both journalist and lawyer in guarding these rights.
9. A committee of representatives of the bar, the bench, and the news media, aided when appropriate by representatives of law enforcement agencies and other interested parties, should meet from time to time to review problems and to promote understanding of the principles of fair trial and free press. Its purpose may include giving advisory opinions concerning the interpretations and applications of these principles.

These principles have been endorsed, as of February 15, 1970, by the following: The State Bar of California, California Freedom of Information Committee, California Newspaper Publishers Association, California Broadcasters Association, Radio and TV News Directors, and the Executive Board of the Conference of California Judges.

(continued)

## EXHIBIT 7.2 (continued)

## STATEMENT OF POLICY

To give concrete expression to these principles in newsmen's language the following statement of policy is recommended for voluntary adoption by California newspapers and news broadcasters.

Our objective is to report the news and at the same time cooperate with the courts to assure the accused a fair trial.

Protection of the rights of an accused person or a suspect does not require restraint in publication or broadcast of the following information:

*—His or her name, address, age, residence, employment, marital status, and similar background information.*

*—The substance or text of the charge, such as complaint, indictment, information, and, where appropriate, the identity of the complainant.*

*—The identity of the investigating and arresting agency, and the length of investigation where appropriate.*

*—The circumstances surrounding an arrest, including the time and place, resistance, pursuit, possession and use of weapons, and a description of items seized.*

Accuracy, good conscience, and an informed approach can provide nonprejudicial reporting of crime news. We commend to our fellow newsmen the following:

Avoid deliberate editorialization, even when a crime seems solved beyond reasonable doubt. Save the characterizations of the accused until the trial ends and guilt or innocence is determined.

Avoid editorialization by observing these rules:

*—Don't call a person brought in for questioning a suspect.*

*—Don't call a slaying a murder until there's a formal charge.*

*—Don't say solution when it's just a police accusation or theory.*

*—Don't let prosecutors, police, or defense attorneys use us as a sounding board for public opinion or personal publicity.*

Exercise care in regard to publication or broadcast of purported confessions. An accused person may repudiate and thereby invalidate a confession, claiming undue pressure, lack of counsel, or some other interference with his rights. The confession then may not be presented as evidence and yet has been read by the jurors, raising the question whether they can separate the confession from evidence presented in court. If you do use a "confession" call it a statement and let the jury decide whether the accused really confessed.

In some circumstances, as when a previous offense is not linked in a pattern with the case in question, the press should not publish or broadcast the previous criminal record of a person accused of a felony. Terms like "a long record" should generally be avoided. There are, however, other circumstances—as when parole is violated—in which reference to a previous conviction is in the public interest.

Records of convictions and prior criminal charges which are matters of public record are available to the news media through police agencies or court clerks. Law enforcement agencies should make such information available to the news media upon appropriate inquiry. The public disclosure of this information by the news media could be prejudicial without any significant contribution toward meeting the public need to be informed. The publication or broadcast of such information should be carefully considered.

***In summary:***

***This Statement of Policy is not all-inclusive; it does not purport to cover every subject on which a question may arise with respect to whether particular information should be published or broadcast. Our objective is to report the news and at the same time cooperate with the courts to help assure the accused a fair trial. Caution should therefore be exercised in publishing or broadcasting information which might result in denial of a fair trial.***



access to court records is evolving, and some lower courts have extended the right to documents other than the transcripts of open court proceedings.

More widely recognized, though, is a common law right to inspect and copy judicial records pertaining to open proceedings. These presumptively open records include not only transcripts of proceedings but also pleadings and motions, court orders, and any materials formally admitted into evidence. This common law right of access is not absolute, however; it is subject to the reasonable discretion of the trial judge. For the most part, access is allowed unless a judge specifically finds that public dissemination would threaten rights to a fair trial or would invade personal privacy.

Many cases in recent years have dealt with requests by broadcasters to copy video- or audiotapes used as evidence in criminal trials. The majority of appellate court decisions has favored these requests, provided that the tapes had already been formally submitted as evidence and had been played in open court.<sup>43</sup>

Some kinds of court records typically are kept secret and are not subject to a common law presumption of openness. For example, transcripts of grand jury proceedings are very rarely made public. Also, journalists usually may not gain access to the settlement agreements in civil cases. As part of a settlement agreement, the parties typically promise to keep the terms of the agreement confidential, and judges often seal the written agreements at the parties' request.

## KEEPING MEDIA SECRETS

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Another point of friction between the media and the justice system often arises when legal authorities want the media to provide information they've obtained in the course of news gathering. In a sense, the authorities want to take advantage of the same sort of aggressive reporting work that often irritates them. The media may have unaired video, photo files, names, and other confidential information, and legal authorities see it as potential evidence in a proceeding.

The problem typically begins when a news reporter or editor is served with a legal document called a **subpoena**, which orders a person who may have evidence relevant to a legal proceeding to either testify in person or produce specified documents or other physical evidence. Subpoenas are issued by lawyers in both civil and criminal cases, and they are also issued by grand juries investigating crime. The recipient of a subpoena may not ignore it. One who fails to comply without showing legal justification can be jailed or fined for contempt of court. On the other hand, the requested information may have been obtained in confidence; often it's the identity of anonymous sources.

A strong societal interest lies behind the enforcement of subpoenas because they are a powerful—even essential—tool for arriving at the truth. Without the authority to subpoena witnesses and documentation, prosecutors and civil litigants would often find it impossible to compile sufficient evidence in their

favor. Potential witnesses who simply do not want to be bothered would be free to ignore pleas for information. For criminal defendants, furthermore, the federal Constitution recognizes that the subpoena power is vital to the basic notion of due process. It is another of the Sixth Amendment's guarantees that an accused person "shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."

But a strong public interest also exists in allowing journalists to decline to serve as sources of legal evidence. This is because tapping journalists for testimony, notes, negatives, and videotape is likely to hinder the free flow of information to reporters and thus to the public. Often sources will talk with news reporters only in confidence, as did the bookie in the chapter Hypothetical. But if prosecuting authorities or civil litigation opponents could obtain that information via subpoena, such sources would tend to dry up.

Also, the routine use of journalists as auxiliary investigators for the legal system could be highly disruptive for the media. Few news operations could count on meeting their deadlines if reporters and editors were frequently compelled to appear in grand jury investigations, depositions, preliminary hearings, and trials. Therefore, the fear is that the news media under such circumstances would simply choose to shy away from aggressive reporting on crime and impropriety. This would indeed be society's loss, for such watchdog reporting is what often brings crimes to light in the first place.

Furthermore, media organizations prefer to avoid answering subpoenas because of the appearance that may be created—that media are essentially an arm of law enforcement. This perception could be damaging to the media's credibility because the media usually must be perceived as autonomous in order to be credible.

Historically, journalists in this country have taken great pride in their aggressive reporting of crime and corruption, and they have resisted—even to the point of going to jail—attempts to force disclosure of journalistic confidences. Journalists claimed that First Amendment rights were at stake, though that legal issue remained unsettled for decades. In the late 1960s, however—an era of civil unrest and increasingly sophisticated TV news operations—the frequency of disclosure orders served upon the media rose sharply. In the two-year period 1969–70, the three major TV networks alone were the targets of more than 150 subpoenas. The time had come to determine whether a "reporter's privilege" truly protected journalists against having to respond.

## FORCED DISCLOSURE AND THE FIRST AMENDMENT

The U.S. Supreme Court directly considered the forced disclosure issue in 1972, in four separate cases collectively known as *Branzburg v. Hayes*. Each of the cases arose when a news reporter was subpoenaed to testify before a grand jury.

In the first case, a reporter named Paul Branzburg had written a story for the *Louisville Courier-Journal* that described how two Kentucky youths made money by converting marijuana into hashish. Branzburg observed firsthand the illegal synthesizing of hashish, but only after promising anonymity to the young chemists. When Branzburg was ordered before the grand jury, he refused to disclose his sources' identities.

The second case involved the same reporter. This time Branzburg ran a story about the use and sale of illicit drugs, based on dozens of firsthand interviews with drug users. Again the grand jury subpoenaed Branzburg to testify as to the crimes and individuals he observed.

In the third case, a Massachusetts TV reporter covering civil unrest had gained entrance to a headquarters of the Black Panther party, a militant black organization. He was allowed to observe the events inside on condition that he report none of what he saw or heard, except in the case of a police raid. No raid occurred, but two months later the reporter was ordered before a grand jury. He discussed what he had seen outside Panther headquarters but refused to answer questions about events inside.

The fourth case involved a reporter for the *New York Times* who had written stories about the Black Panthers in the San Francisco area. A federal grand jury investigating possibly criminal conduct by the Panthers ordered the reporter to answer questions and to turn over notes and tapes of interviews. He refused.

### ***The Branzburg Plurality***

The Supreme Court considered the cases together and came away deeply divided. In the Court's plurality opinion, written by Justice White, it declined to recognize a special First Amendment privilege for the journalists. The Court reiterated the basic principle that the media have no constitutional immunity from laws affecting the general public. It also noted that the cases did not involve direct controls on what the media must or must not publish: "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime."<sup>44</sup>

Under the specific facts of these cases, in which crimes were perhaps being concealed, the Court ruled that reporters were not constitutionally excepted from the duty to comply with grand jury subpoenas. It did note, though, that the subpoenas must be issued in good faith, not in an effort to harass the media.

The Court's ruling and the plurality opinion are but a small part of the *Branzburg* story, however. Only four members of the Court plurality believed that news gatherers possessed absolutely no First Amendment privilege. Four other justices dissented, and the critical swing voter, Justice Powell, wrote his own concurring opinion, which took the middle ground.

### ***Branzburg Concurrence and Dissents***

The dissenting justices argued for recognition of either an absolute or a qualified First Amendment privilege for journalists. And Justice Powell, though voting against the reporters in these grand jury cases, wrote that he saw the Court's holding as a narrow one and that a constitutional privilege might indeed apply in other situations. Powell wrote that the proper approach should be a case-by-case balancing between freedom of the press and the legitimate needs of the justice system.

The vote in *Branzburg* was 5–4 against the reporters. But when the lower courts looked to the Supreme Court for guidance in other cases, they saw that five justices apparently believed that at least a qualified reporter's privilege should exist.

Ironically, the *Branzburg* decision has led in many jurisdictions to case law recognizing a reporter's limited privilege, under the First Amendment, to resist subpoenas. Most of the federal courts of appeals have recognized the privilege, as have many state courts.

To summarize, the *Branzburg* decision is significant for the following reasons:

1. It established that journalists do not have an absolute constitutional right to resist subpoenas.
2. It means that journalists must comply with relevant grand jury subpoenas in situations similar to the *Branzburg* cases.
3. It led to the specific recognition in many lower courts that journalists do have a qualified constitutional right to withhold unpublished information and sources' identities in other situations.

But a warning on this third point: In 2005 a few high-profile court rulings against reporters sent shock waves through the journalism profession and served as a reminder that not all courts recognize a First Amendment privilege, or at least, certainly not a strong one.

### ***First Amendment Privilege Applied***

In dealing with the qualified reporter's privilege, many state and federal appellate courts have articulated specific tests for the trial courts to follow. The tests vary from one jurisdiction to another, but the courts commonly consider the following factors:

1. *The relevance and importance of the requested information.* The trial judge must determine whether the information elicited from the reporter will bear directly on the issues in the case and whether a claim or defense could hinge on the information.
2. *Availability through alternative means.* In order to override the journalist's qualified privilege, courts often require a showing that the information could not be obtained from other, nonjournalistic sources.

3. *The type of controversy.* The public interest in resolving criminal charges is considered weightier than the interest in resolving purely private disputes. Therefore, the journalist's right to safeguard confidential information is more likely to be upheld in a civil proceeding and more likely to be overridden in a criminal prosecution.
4. *How the information was gathered.* Courts tend to recognize a greater need for privilege when the media gain information through confidential relationships and a lesser need when the information is gained from firsthand observation without a confidential source.

The required consideration of these factors is an important First Amendment safeguard against fishing expeditions at the expense of the media. The constitutional privilege is far from absolute, however. Under this minimum level of protection it is still common, particularly in criminal cases, for courts to order journalists to testify or produce materials. Also, the privilege applies only to unpublished information. Once the media decide to publish information, there is no privilege against reiterating those facts in a judicial proceeding.

The 1995 case of *Shoen v. Shoen*<sup>45</sup> illustrates how some courts consider various balancing factors. The case involved an underlying lawsuit for defamation. Leonard Shoen, founder of the U-Haul Corporation, had publicly implicated two of his sons in the death of another family member. The sons sued their father for libel. Meanwhile, investigative author Ronald Watkins, who was working on a book about the Shoen family feud for control of U-Haul, conducted extensive interviews with Leonard Shoen. So the Shoen brothers, searching for evidence of actual malice by their father, served Watkins with a subpoena ordering him to appear for a deposition with all his interview notes and recordings. Watkins refused. The trial court found Watkins in contempt and ordered him to jail until he agreed to comply. But the contempt citation was reversed by the U.S. Court of Appeals for the Ninth Circuit.

The court held that in a civil lawsuit where the journalist is not a party to the suit and the information sought is not from a confidential source, the journalist's First Amendment privilege may be overcome by showing three things: that the information is unavailable elsewhere, is noncumulative, and is clearly relevant to the case. The information sought from Watkins was not relevant to the issue of actual malice, the court said, because there was no evidence that Shoen actually discussed his motivation for making the defamatory statements. Furthermore, to the extent the information was sought to demonstrate Shoen generally harbored ill will toward his sons, the information was merely cumulative. In other words, rather than providing a new element to the case, the information would simply add to existing evidence of ill will. Therefore, in *Shoen* the journalist's privilege was upheld.

In contrast to *Shoen*, however, the U.S. Court of Appeals for the Fifth Circuit in 1998 interpreted *Branzburg* as creating First Amendment protection only when subpoenas are being used to harass the media. In *United States v. Smith*, a television reporter taped an exclusive interview with Frank Smith, who was under

suspicion of setting fire to a distribution center in New Orleans. Some days later Smith was arrested, and the TV station broadcast a small portion of the interview in which Smith said he heard the manager of the center plotting to set the fire. The federal government subpoenaed the station for the unaired portion of the interview. But the station resisted based on First Amendment privilege.

The Court of Appeals held that no privilege applies in this situation:

WDSU-TV seeks to protect only nonconfidential information obtained from a person who wanted it aired when he gave it. . . . WDSU-TV's fears that nonconfidential sources will shy away from the media because of its unholy alliance with the government are speculative at best. . . .

*Branzburg* will protect the press if the government attempts to harass it. Short of such harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen.<sup>46</sup>

And finally, a 2002 example from a state court: The *Waterloo/Cedar Falls Courier* had sued Hawkeye Community College and its board of trustees for holding closed meetings that allegedly violated the Iowa open meetings act. After the lawsuit was filed, two of the paper's editors talked with two people who were present at the closed sessions and presumably obtained details of the meetings (which eventually led to the college president's resignation). The editors promised their sources confidentiality. During the lawsuit's discovery process, the college demanded the sources' identities and the substance of the conversations. Or, as the Iowa Supreme Court put it, "A local community college wants newspaper editors to tell who ratted them out."<sup>47</sup>

The state's high court said the editors came within the scope of the First Amendment reporter's privilege because, when they talked to their sources, the editors were employed at the newspaper and were investigating the closed meetings for journalistic purposes—not simply collecting evidence for the *Courier's* court case. The next question was whether the college could overcome the limited reporter's privilege by showing that the information was likely necessary to its defense and could not be obtained from other, nonmedia sources. The court held no, that the information the college sought was not necessary to its defense in the open meetings case because the *Courier* didn't use the informants' information as a basis for the lawsuit, which had already been filed, and because the *Courier* had no plans to call the informants as witnesses in the case. Therefore, the reporter's privilege applied, and the paper could keep its sources confidential.

Keep in mind that these cases are just examples. Courts continue to wrestle with the legal ramifications of *Branzburg*, and application of the First Amendment reporter's privilege is inconsistent from jurisdiction to jurisdiction.

### ***The Josh Wolf Saga of 2007***

The potential hazard to the media is illustrated by the ordeal of Josh Wolf, a freelance journalist and video blogger. Wolf had shot video at a San Francisco

protest rally that turned violent. Later he was subpoenaed by the FBI Joint Terrorism Task Force to appear before a federal grand jury, turn over his unedited and unpublished video, and answer questions. The federal government was investigating attempted arson aimed at a law enforcement vehicle, and Wolf assumed the government wanted his help identifying perpetrators (though that was never entirely clear). Wolf tried every legal avenue to fight the subpoena but was unsuccessful. When he still refused to appear before the grand jury, on the ground that it would make him part of an investigation and detract from his role as a journalist, he was held in contempt and sent to a federal detention center.

Wolf remained in confinement for 226 days—a record duration for a U.S. journalist to be held by his own government—until a deal was struck with prosecutors. Wolf was released when he posted his video for all to see on the Internet, as he agreed. He had still not testified, however, and it remains uncertain whether the video provided any benefit to the government investigation.

## SHIELD LAWS

The various states are at liberty, of course, to provide journalists with greater protection than the limited privilege derived through First Amendment interpretation. In a few states this has been done judicially, through interpretation of a state constitution or common law. More important, more than half the states have done so legislatively, by passing specific statutes or state constitutional provisions known as **shield laws**. These state laws vary tremendously: In some the language is narrow and conditional; in others the privilege is stated in absolute terms.

Shield laws in some form are operative in the District of Columbia and thirty-seven states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Washington. Texas was the most recent of these to enact its shield law, which became effective in 2009.

Though the scope of state shield laws varies widely, they tend to provide a more dependable form of protection than the privilege derived thus far from the federal Constitution. This is because the shield laws establish more formal categorical guidelines and rely less on case-by-case balancing tests. Some of the most important ways in which the shield laws of the various states differ are as follows:

1. Some provide protection only in narrow arenas, such as before grand juries; others apply to virtually any government demands for information.
2. Some shield only the confidential sources of information; others protect the information itself.



## Protection Against Subpoenas

- Does the state have a shield law? Does it protect confidential sources? Journalistic work product? Testimony about events witnessed firsthand?
- If a shield law does not apply, would a First Amendment balancing test provide protection?
- Does the newsperson have evidence clearly relevant to the proceeding?
- Is there no other source for the information?
- Does the requestor have a legitimate need for the information?
- Is it a criminal defendant seeking the information, thus raising a Sixth Amendment right to compel evidence on the defendant's behalf?

3. Some protect only the information obtained through confidential sources; others apply to evidence journalists witness firsthand.
4. Some grant protection only to regular employees of traditional news media; others extend to both employees and freelancers in a broader range of mass media.

Often shield laws do not make these distinctions clearly; in such cases it is left to the courts to interpret the statutes in light of public policy concerns and legislative intent. To understand your state's shield law fully, you must read not only the language of the statute but also the leading court opinions interpreting the statute.

Despite the existence of shield laws in many states, media subpoenas are fairly common. Typically a few thousand subpoenas are served on the media each year, with TV stations tending to receive more than newspapers. And even in the majority of states with shield laws, those laws may offer no protection when the subpoena comes from the federal government.

### ***Shield Laws and the Sixth Amendment***

State shield laws may indeed provide journalism with a broader privilege against forced disclosure than does the First Amendment. But shield laws may not push aside a criminal defendant's fair trial rights under the U.S. Constitution. Recall that criminal defendants are guaranteed certain due process rights, including the Sixth Amendment right to compel testimony and other evidence on the defendant's behalf. Therefore, when a criminal defendant seeks evidence from a journalist, even the strongest shield laws may have to yield to the defendant's request.

This point is illustrated by a 1990 decision out of California, which has one of the broadest shield laws in the country. A *Los Angeles Times* reporter and a photographer had accompanied police on patrol, and they watched as officers searched a man for illegal drugs. The search turned up a set of brass knuckles, and the man



was prosecuted. In his defense, the man questioned the legality of the police search, and the *Times* employees were summoned to tell what they had observed.

The California Supreme Court held that the state shield was indeed very broad and that it protected reporters' firsthand observations in public—usually. But the court said the state shield law cannot restrict a criminal defendant's federal constitutional right to a fair trial. Therefore, the state privilege must give way if a criminal defendant demonstrates a reasonable possibility that the information will assist his defense.<sup>48</sup>

### **Media Defendants**

Another limitation on shield laws may arise when a medium is a party to a lawsuit. The courts will tend to order disclosure of any information legitimately sought through the legal process by the opposing party. The dilemma for a news medium is most acute when it is sued for defamation and the plaintiff seeks the identities of confidential sources who provided the defamatory information.

On the one hand, forced disclosure of confidential sources clearly could have a chilling effect on important news-gathering efforts, and the discovery process could be abused by those wishing to retaliate against anonymous sources. On the other hand, defamation plaintiffs have a difficult task under modern libel rules, and they should be able to compel disclosure of the evidence that might demonstrate actual malice. In these situations, the courts usually have used some version of a First Amendment balancing test to determine whether the plaintiff truly needs the requested information from the defendant and whether a shield law therefore should be overridden.<sup>49</sup> When the media are parties to a lawsuit, they bear the added risk of a default judgment if they do not comply with discovery orders.

In a recent case, for example, a physician sued the *Boston Globe* and its reporter for libel after the paper ran a story critical of the doctor's role in a chemotherapy overdose that killed a cancer patient. The doctor also sued other parties on related claims and, in the pursuit of her legal action, she demanded the identities of confidential sources the *Globe* had used in the story. The trial court judge ordered the paper to produce the information, but it refused. So the judge entered a default judgment against the newspaper. In 2002, a jury determined the *Globe* should pay \$2.1 million on that judgment. The jury's action was upheld by the state's highest court in 2005.<sup>50</sup>

### **Federal Shield Legislation**

Standoffs between federal grand juries and journalists, such as the Josh Wolf episode noted earlier, have for many years fueled sentiment for a federal shield statute. The sentiment had never been strong enough to actually enact legislation, however. As this book went to press in 2009 it appeared that could change. In June that year the new attorney general, Eric Holder, testified before the Senate Judiciary Committee that the Department of Justice could support a media shield

law as long as it did not constrain government's ability to protect national security and prosecute those who leak classified information.

A shield bill titled the Free Flow of Information Act of 2009 was introduced in each house as H.R. 985 and S. 448. The legislation as introduced would cover anyone "engaged in journalism" on a regular basis. Journalists could not be compelled by federal authority to disclose confidential sources, notes, or records obtained in the course of newsgathering, except when truly essential to an investigation or civil proceeding or when reasonably necessary to prevent death, kidnapping, substantial bodily harm, or an act of terrorism. The proposed shield would not apply to eyewitness observations of alleged criminal conduct.

### ***Ethical Concerns***

In deciding whether to provide evidence to grand juries, the courts, or other government agencies, journalists often face serious ethical concerns as well as legal ones. Reporters sometimes conclude they have a societal duty to comply with evidentiary requests, even if the law does not require them to do so. Few news organizations believe that journalists must categorically shun all requests for evidence, no matter the circumstances. Circumstances could arise when a sobering matter of justice rests on the requested information and when the reporter's cooperation would be unlikely to compromise journalistic effectiveness and the greater public good.

But history is full of examples of journalists convinced that good ethics precluded disclosure, even when the law compelled it. This dilemma often arises when a reporter promises confidentiality to a source—an issue raised in the chapter Hypothetical. Recall that you promised complete anonymity to a source who then told you of the dead woman's gambling debts. That source might now be essential to the defense of the man accused in her death, so you might be legally ordered to disclose the source's identity, even in a shield law state. But what is your ethical obligation? Under what circumstances would you go back on your word, if ever? Would it depend on the extent of your punishment for disobeying the law? Would it depend on whether you thought the defendant was innocent and the nature of the possible sentence? Or should your ethics simply follow the law?

## **LEGAL OBLIGATION TO SOURCES**

Several courts in recent years have addressed a different aspect of this topic: Suppose a journalist promises confidentiality to a source and receives information in exchange for that promise. But later the journalist (or the journalist's editor or news director) decides unilaterally to reveal the source. Has there been a breach of any legal duty owed to the betrayed source?

The Supreme Court considered such a claim in *Cohen v. Cowles Media Co.* In the closing days of a Minnesota gubernatorial race, one of the candidates'

campaign consultants, Dan Cohen, approached reporters from two newspapers and offered to provide newsworthy documents concerning the opposing party's candidate for lieutenant governor. Cohen made it clear that he would provide the information only if he was promised confidentiality. The reporters promised to keep Cohen anonymous, and he in turn provided copies of court records showing that the candidate, Marlene Johnson, had been convicted twelve years earlier for shoplifting six dollars' worth of sewing materials. The editors at both newspapers decided independently that it was important to publish Cohen's name as part of their stories concerning Johnson. Cohen was identified as the source of the records and, on the same day the stories appeared, Cohen was fired from his job at a public relations agency.

Cohen sued the newspapers, alleging breach of contract, and a jury awarded him \$200,000 in damages. The Minnesota Supreme Court reversed, however, concluding that enforcement of the confidentiality promise would violate the papers' First Amendment rights to make editorial decisions. The U.S. Supreme Court, in a 5–4 decision in 1991, reversed the Minnesota high court and ruled that enforcing the promises of confidentiality would not violate the newspapers' constitutional rights. Writing for the majority, Justice White said the case was controlled by the “well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”<sup>51</sup>

In his dissenting opinion, Justice Harry Blackmun said the application of contract law to this scenario would amount to more than an incidental burden on speech. Furthermore, he said laws may not be enforced in such a way as to restrict the expression of truthful information or opinion unless the restriction is justified by a compelling government interest. In this case, the publications at issue were factually correct, and the state's interest in enforcing the reporters' promises was far from compelling, Blackmun argued.

The Supreme Court returned the *Cowles Media* case to the Minnesota Supreme Court to determine whether a contract had indeed been formed and whether enforcement of such an agreement would violate the Minnesota Constitution. The Minnesota high court in 1992 declined to construe the state constitution as providing broader protection to the media than the U.S. Constitution. It concluded that the promises made to Cohen were enforceable based on a variation of contract law called promissory estoppel. This contract theory applies when a promise is reasonably relied upon, to the substantial detriment of the relying party. The Minnesota court therefore awarded Cohen the \$200,000.<sup>52</sup>

In light of *Cowles Media*, journalists should be careful about entering agreements in which they create specific expectations of confidentiality. Some media lawyers advise their clients to adopt clear policies regarding vows of confidentiality so that reporters in the field are less likely to make promises that their editors will overrule back in the newsroom.

## POLICE SEARCHES

With shield laws and the First Amendment providing journalists with avenues to resist answering subpoenas, law enforcement officials may be tempted to obtain evidentiary materials from the media with a more direct tool—the search warrant.

In the classic 1971 case, police were called to remove demonstrators who had seized the administrative offices at Stanford University Hospital. When police forcibly entered a hallway, they were attacked and beaten by some demonstrators armed with clubs. The *Stanford Daily* published photos of the demonstration, and the police believed this student newspaper had additional photos that would help identify the perpetrators of the criminal assault upon police. The police decided to obtain the additional photos in the most direct manner possible: They showed up at the *Daily* office with a search warrant and proceeded to search the photo labs, file cabinets, desks, and wastepaper baskets. They found nothing that had not already been published. The *Daily*, however, sued the police chief and other officials, claiming that the search violated the paper's First Amendment rights.

The search process, argued the *Daily*, is physically disruptive, intimidating to the news staff, and a threat to the cultivation of confidential sources. The case eventually reached the U.S. Supreme Court, where the paper lost. The Court held in *Zurcher v. Stanford Daily*<sup>53</sup> that as long as a search warrant is supported by probable cause to believe that evidence of a crime will be found, a search is acceptable. Nothing in the Constitution gives the press a special privilege to avoid this process, the Court said in the 1978 decision.

Some states and Congress, however, accepted the notion that the press should be protected against the intrusiveness of police searches and that news organizations' materials should be requested by subpoena instead—an avenue that at least gives the media time to consult legal counsel and plan a response. In the Privacy Protection Act of 1980,<sup>54</sup> Congress provided the protection that the Supreme Court would not. The federal statute prohibits newsroom searches and seizures except when (1) the person possessing the materials is the criminal suspect, (2) immediate seizure of materials is deemed necessary to prevent death or serious injury, (3) serving a subpoena would likely result in destruction or concealment of the materials, or (4) a subpoena and court order to comply have already been unsuccessful. In the absence of one of these exceptions, law enforcement personnel must use a subpoena rather than a search warrant to obtain evidence from news organizations.

## CONTEMPT OF COURT

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Journalists who refuse to reveal a source or to provide other evidence in defiance of a judge's order risk being slapped with stiff sanctions for **contempt of court**. Actually, almost any activity that directly interferes with a court's administration

of justice may be considered contempt of court. A photographer's refusal to abide by a court's rules of decorum, for example, could bring a citation for contempt.

Contempt of court is punishable by fines, jail time, or both. In a classic 1970s case, for example, *New York Times* reporter Myron Farber published stories about mysterious deaths that had occurred at a New Jersey hospital. The stories led to a lengthy homicide trial, and the defendant's attorney subpoenaed Farber's notes. A court upheld the subpoena. Farber and the *Times* refused to comply, however, and were cited for contempt. The newspaper was fined \$100,000, plus \$5,000 per day, until it complied. Farber was sentenced to an indeterminate amount of jail time until he complied, plus a six-month jail term to begin after he surrendered the notes.<sup>55</sup>

Citations for contempt are often categorized as either criminal or civil, both of which were present in the Farber case. A finding of criminal contempt typically results from conduct that defies the dignity and power of the court, such as repeated disruptive behavior during court proceedings. The sanction, intended as punishment, comes in the form of a fixed fine or term of imprisonment.

A finding of civil contempt typically results when a reporter refuses to answer questions or provide journalistic materials that would benefit one of the parties. The sanction in this case is not punitive but coercive: The fine or imprisonment accumulates day by day, and it will end whenever the journalist decides to comply with the court order—or when the order becomes a moot point because the court proceedings have since concluded.

Perhaps the most important thing to remember about contempt in most jurisdictions is that if you violate a court order, you may not ward off a contempt citation by claiming that the underlying court order was invalid. For example, suppose a trial court judge orders you to comply with a subpoena and turn over your negatives of a traffic accident scene to the plaintiff in a civil lawsuit. Instead, you disregard the order and destroy the negatives. You are cited for criminal contempt. You cannot defend against your contempt citation by claiming that the underlying order to produce the negatives was improper. Your only appropriate legal avenue, according to the general rule, is to challenge the initial order—through the courts. Until such time as a court order is actually ruled improper by a higher court, it must be obeyed.

The problem with this general rule, sometimes called the *Dickinson* rule,<sup>56</sup> is that an obviously improper court order could nevertheless delay publication, hamper reporting efforts, and otherwise tie up the media in expensive legal procedures for quite some time. Such a result can be particularly disruptive for the mass media, where daily deadlines are so important. A few courts, therefore, have broken with the *Dickinson* rule in situations in which court orders amounted to clearly invalid prior restraints on speech. In such cases, these few courts have ruled, media that disobey the order are not liable for contempt.<sup>57</sup> However, you should never disobey a court order without first consulting a lawyer.

Recall the CNN case discussed under “Gagging the Media.” CNN had aired portions of the Noriega jailhouse tapes despite a federal judge’s temporary restraining order. Though the allegedly unconstitutional restraining order was ultimately dissolved, CNN in 1994 was found in criminal contempt for having willfully violated the order while it was in effect.<sup>58</sup> The court imposed an \$85,000 fine, and CNN agreed, in lieu of additional fines, to broadcast an admission of error. In December 1994, CNN aired a statement that read in part: “CNN realizes that it was in error in defying the order of the court. . . . We do now and always have recognized that our justice system cannot long survive if litigants take it upon themselves to determine which judgments or orders of the court they will or will not follow.”

Though the contempt power of courts is broad, it is not without legal limitations. For example, the U.S. Supreme Court has clearly established that public criticism of judges, levied by the media or members of the public, is protected speech that only in the rarest of circumstances could be punished as contempt. The general standard is that public criticism of a judicial officer cannot be punished absent evidence of “a clear, present and imminent danger to the investigation . . . and to the proper administration of justice.”<sup>59</sup>

## Summary Points

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**Perhaps the mass media’s most traditional and important activity** is covering the justice system. Sometimes coverage may compromise other important interests, however, such as a criminal defendant’s right to a fair trial.

**Judges in the lower courts are responsible** for ensuring the fairness of proceedings, and they have many tools for mitigating the potential effects of media publicity. Most of these tools, such as the change of venue or admonishment of the jury, do not infringe on First Amendment rights of the media.

**Prior restraints on the media** (gag orders) and closure of traditionally open proceedings are two judicial actions that are considered interferences with free expression. Therefore, these actions are constitutional only under rare circumstances, when the courts have specific evidence to show they are necessary. Gag orders on trial participants are more likely to be valid, however, and a few kinds of court proceedings are closed by tradition.

**Sometimes the tables are turned**, and the justice system wants the media to provide testimony, notes, video, or other work-product materials as evidence in a proceeding. A practice of answering subpoenas may be deleterious to news-gathering efforts, however, and many courts have recognized a limited First Amendment privilege for the media to keep unpublished information confidential.

**Many states have gone even further** by enacting shield laws for the media, though the scope and strength of these laws vary considerably from state to state. Under the Privacy Protection Act of 1980, law enforcement agencies generally cannot resort to newsroom searches in an effort to obtain information directly. Rather, they must use the subpoena process.

**When journalists or others disrupt court proceedings** or disobey court orders, judges may have the authority to punish that behavior by issuing citations for contempt. Criminal contempt is punishment for past misconduct and results in a fixed fine or jail term. Civil contempt is an effort to coerce compliance with a court order, and thus the fine or jail time is indeterminate.

**The chapter Hypothetical raised three separate legal issues:** whether you had a privilege to refuse to testify in court, whether you could overturn the judge's gag order, and whether the courtroom closure was valid. Most likely you would be required to testify in court, even if the state had a strong shield law, because it is a criminal defendant seeking the testimony—a Sixth Amendment right—and the testimony is relevant and probably not available from others. The judge's gag order, on the other hand, would be unconstitutional because it was issued without the accompanying findings required by the *Nebraska Press* case. As for the courtroom closure, it, too, was ordered without the requisite judicial findings and would likely fail the other three prongs of the closure test that evolved from the *Press-Enterprise* cases.

## Discussion Questions

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1. Many of the access questions discussed in Chapter 6 could be much simplified, it seems, if the Supreme Court would extend the rule of *Richmond Newspaper v. Virginia*, discussed in this chapter, to government proceedings and information in the executive and legislative branches. Is the argument equally compelling, for example, that city council meetings have traditionally been open and that their continued openness therefore should be guaranteed by the First Amendment? If such a First Amendment right of access were extended to all traditionally public government meetings and records beyond the judicial realm, would this be an improvement over the current jurisdiction-by-jurisdiction system of access statutes?
2. With camera access to courtrooms now the rule rather than the exception, broadcast and cable television channels, and even websites, sometimes offer live, gavel-to-gavel coverage of both criminal and civil trials. Occasionally these trials include graphic testimony that many would consider unfit for children. In the long run, do you think such media coverage is in the public's best interest? Or is there an overriding public interest in letting some kinds of judicial proceedings be decided behind closed doors?

3. In the *Stanford Daily* case, the newspaper essentially argued that it is less troublesome for journalists to be served with subpoenas than with search warrants. Why? Why, exactly, would news organizations prefer to deal with subpoenas for materials than with search warrants?

## Key Terms

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bench/bar/media committees  
change of venue  
contempt of court  
continuance  
gag order  
impartial jury

jury admonitions  
sequestration  
shield laws  
subpoena  
voir dire



# Creative Property



*After completing this chapter, you should*

- **Understand** the separate purposes of copyright and trademark laws and the general scope of those laws.
- **Know** the legal requirements for attaining copyright or trademark protection and the benefits of government registration schemes.
- **Know** some common ways in which creative property rights are licensed to others in the major media industries.
- **Know** what constitutes infringement, in traditional media and the Internet, and the legal remedies and penalties for infringement.
- **Understand** the extent to which the creative property of others may be used without violating the law.
- **Know** how unfair competition law can be applied to fill in the gaps between copyright and trademark laws.

## Hypothetical

### The High-Energy Campaign

You are an executive at a mid-sized advertising agency. Your task is to develop a national TV and Internet campaign for a new energy drink called “2XS.” The basic strategy is to associate the drink with a consumer segment that admires bold athletic achievement. You intend to produce a sixty-second TV spot to run for a year, perhaps two years if successful, along with twenty-second versions to place on the Internet. Here’s your content plan:

The commercial will feature still photographs, as they originally appeared in newspapers and magazines, depicting moments of almost-unimaginable physical exploit. To save money, you will lift the photos directly from the publications, without asking anyone for permission. You can do this, you assume, because these are newsworthy photos that have already appeared publicly in news contexts, perhaps many times.

To accompany the photos you need high-energy music. You settle on an old hit that many will recognize, “Born to Be Wild.” Here again, you have an idea to save money. Instead of paying the recording company for permission to use the actual hit recording, you will hire musicians to re-record a sixty-second segment of the song, trying as much as possible to make it sound just like the original hit recording. Once the campaign gets rolling, you are hoping to find a way to prevent any other, competing beverage company from using the same song in its advertising. Eventually you plan to consult your legal team about this.

You are also concerned that, as the product becomes better known, you may have trouble protecting the “2XS” brand against unauthorized uses. You wonder if you should recommend any particular protective steps to your client.

Will your reproduction of photographs present likely copyright infringement problems for you? How about your plan for securing music? Are you avoiding a dispute over music copyrights? What steps might be prudent to make the client’s trademark as strong as possible?

## A SPECIAL KIND OF PROPERTY

Property laws are concerned with the rights of ownership in things. With ownership of a personal computer, for example, come exclusive legal rights—such as the right to determine whether the machine will ever be lent or rented to others. Less obvious, perhaps, disputes over copyrights and trademarks also involve the principles of property law. The property concept is not limited to physical things like computers, cars, and office buildings; it includes intangible creations, such as arrangements of musical notes, pictures, and words.

These creative forms of property are sometimes called **intellectual property** because they are products of the mind and have legal status apart from any physical product upon which they may be fixed. For example, suppose a business owner dreams up an advertising script and writes it on a piece of paper. A visiting competitor happens to glimpse the paper, copies the script into his electronic notepad, and then uses the material in his own business. The competitor never took anything tangible. Yet he may well have violated the intellectual property rights of the scriptwriter.

This chapter discusses two main forms of intangible property: copyrights and trademarks. It also looks briefly at how the law of unfair competition has evolved to fill the gaps between copyright and trademark protection.

## COPYRIGHT

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**Copyright** may be defined as a proprietary right of control over literary or artistic creations. It is the lifeblood of television and film production companies, magazines, book publishers, record companies, and freelance writers and artists in all fields. Copyright is also an important asset of news organizations. But copyright law also drastically restricts these same companies' and individuals' freedom to "borrow" material from others.

Under the sanction of copyright, owners are afforded virtual monopolies over their protected works of expression. The primary purpose of copyright protection is not to make writers and artists rich, but to encourage creative production for the ultimate benefit of society at large by giving individual writers, artists, and media organizations control over how and when their works will be exploited commercially. Without this legal protection, creators would be discouraged from producing because anyone else could copy and market the original creators' works and usurp their rightful profits. Also, publishing and production companies would hesitate to invest in major projects, knowing that the creations could be pirated without restraint by their competitors. The theory of copyright law, then, is to give creators economic incentive so that society will benefit from creative production.

The power of Congress to enact copyright laws is derived directly from Article I, Section 8 of the U.S. Constitution, which states in part: "The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Under authority of this clause, Congress has enacted patent legislation to create ownership rights in inventions as well as copyright laws to protect expression.

The first copyright statute in the United States was adopted by Congress in 1790, and the law has been substantially revised many times since. The last comprehensive revision came with the Copyright Act of 1976, which took effect on

January 1, 1978.<sup>1</sup> This chapter focuses on the 1976 act, although some sections of the act it replaced, the 1909 Copyright Act, are still relevant to copyrights in existence before the 1976 act took effect.

Congress has since updated the 1976 law in an effort to keep pace with advancing technology and international agreements. For example, the Berne Convention Implementation Act of 1988, which took effect on March 1, 1989, sought to bring U.S. law into accord with the Berne Convention for the Protection of Literary and Artistic Works, an international copyright agreement. In 1998 Congress passed the Copyright Term Extension Act, adding years to the duration of copyright protection, as some other nations had done. That same year Congress also enacted the Digital Millennium Copyright Act to address issues relating to copyright in cyberspace.

In the United States today, copyright law is a matter of federal jurisdiction. The Copyright Act of 1976 specifically replaces state common law protections that existed along with federal law until that time. Copyright disputes arising under the 1976 act are heard only in the federal courts. The day-to-day administration of copyright formalities is delegated to the U.S. Copyright Office, which is part of the Library of Congress. The office registers copyright claims, accepts copies of works, and records documents relating to copyright ownership and transfers.

## PROTECTED WORKS

Copyright protection applies to “original works of authorship, fixed in any tangible medium of expression.”<sup>2</sup> To understand the copyright law, it is essential to understand the components of this description of copyrightable works.

### **Expression**

The term *work of authorship* refers to any creation that is primarily expressive in nature. Copyright protects the creator’s particular manner of expression, as distinguished from ideas or underlying facts. No particular degree of literary or artistic merit is required in order to obtain protection, but the work must have involved some expressive effort.

For purposes of illustration, the 1976 Copyright Act lists the following seven categories of works of authorship:

1. Literary works
2. Musical works, including accompanying words
3. Dramatic works, including accompanying music
4. Pantomimes and choreographic works
5. Pictorial, graphic, and sculptural works
6. Motion pictures and other audiovisual works
7. Sound recordings<sup>3</sup>

Computer programs are considered literary works and thus are copyrightable under the first category. Likewise, test questions—and essay answers—may qualify for copyright protection as literary material. Photographs, maps, charts, technical drawings, and diagrams are all copyrightable forms of expression under the fifth category. Cartoon characters such as Mickey Mouse or Charlie Brown are also protected as pictorial works.


Remember that it is not the information contained in, say, a news story or a map that is protected by copyright. Such a rule would have the repressive effect of preventing others from writing about the same event or publishing a map of the same region. Rather, it is the particular manner of expression that is covered by copyright—the phrasing of the news story, the graphic method of depicting mountains and highways on the map. As a general rule, if there is only one way to state something, it is not copyrightable. For example, the scientific equation  $E = mc^2$  could not have been copyrighted by Albert Einstein.

Similarly, raw ideas—including ideas that underlie an expressive work—cannot be protected. For example, the general idea or plot for a screenplay cannot be protected. Nor can the basic idea for a literary character. But the actual dialogue, the detailed traits of the characters, and the specific scene descriptions all are forms of expression that can be protected by copyright.<sup>4</sup> Fictional literary characters such as James Bond can be protected by copyright, independent of a particular story, to the extent that an author has delineated sufficiently distinctive characteristics to transcend the setting of an individual screenplay or novel (see Exhibit 8.1).

An important limitation is that names, titles, and other short phrases, even though expressive, do not qualify as works of authorship for purposes of copyright protection. Depending on how they are used, names and short phrases—including the names of literary characters or periodicals—may be protected under the more limited scope of trademark or unfair competition laws. For copyright protection, however, a more extended work of expression—something beyond a label or identification—is required. If this weren't the rule, simple newspaper headlines and mere terms, such as *star wars*, could be removed from the marketplace.

### **Originality**

Copyright law specifies that, in addition to being a work of expression, the work must be original. Originality means that the author created the work—that it is not simply a reproduction of existing material. There is no requirement that the work be unique, however. Two or more photographers might take pictures of the Grand Canyon from the same vantage point, at the same time of day and year, such that the photos are barely distinguishable. But as long as each performed the camera work independently, rather than copying someone else's photo, the photographers will have created copyrightable works. The photos need not be novel or distinctive, just original. In this respect copyright law is much different from



Text not available due to copyright restrictions

patent law (which applies only to novel inventions) and from trademark law (discussed later in this chapter).

Works may be copyrightable even though they include some unoriginal components, however. The Copyright Act specifically affords protection to compilations and to derivative works.<sup>5</sup> In both cases original, creative effort is added to preexisting material in such a way that a new, copyrightable work of authorship is created.

A **compilation** is a work formed by the collection and assembly of preexisting information. Examples may include business directories, databases, and stock

price lists. The individual bits of information contained in such works are not original creations of the compilation author and, taken individually, they may not even be copyrightable. Yet the compilation as a whole is an original, copyrightable work if the information is selected, arranged, and presented through independent effort and with “a modicum of creativity,” to use the judicial phrase.

For example, a federal District Court concluded in 1991 that *O'Dwyer's Directory of Public Relations Firms*, an annual listing of more than one thousand PR agencies, was a copyrightable compilation. Each individual listing, which included a firm name, address, and list of employees, was purely rote information that lacked the requisite originality to support a copyright, the court said. But O'Dwyer's creative effort in soliciting the listings and determining which firms qualified for inclusion was sufficiently creative to render the directory as a whole a copyrightable compilation.<sup>6</sup>

In contrast, the U.S. Supreme Court held in 1991 that the white-page listings in a telephone directory did not amount to a copyrightable compilation. Although the telephone company did hold a valid copyright on other portions of the directory, said Justice O'Connor for the unanimous Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*, the white-page listings lacked the originality necessary to qualify as a protected compilation. Not only were the raw data—telephone subscribers' names, towns, and phone numbers—uncopyrightable facts, but the way in which the company selected and arranged that data was not original in any way, the Court concluded. Wrote Justice O'Connor:

The originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.<sup>7</sup>

Compilations made up of contributions that are themselves expressive works are called **collective works**. Examples would include a magazine containing freelancers' articles or an anthology of short stories by various writers. Though the creator of the collection did not write the contributions, the added elements of selection, editing, and arrangement amount to an original, copyrightable work of authorship. This does not mean that the collection author gains copyright control over the individual contributions to the collection, however. The individual contributions might be protected by previous copyrights, and the collection author probably needed permission to reprint them, but the collection now is an additional copyrightable work separate from those individual components.



### Is It Copyrightable?

- Has a work of authorship been created?
  - Is it a predominantly expressive work—e.g., literary, musical, graphic, or audiovisual?
  - Does it contain more than raw facts or ideas?
  - Is it more extensive than a mere title or short phrase?
- Is the expressive work original, resulting from some independent creative effort?
- Has the work been fixed in reproducible form, such as on paper, film, or computer disk?

By definition, a **derivative work**—whether a translation, dramatization, fictionalization, condensation, or any other form—is based on one or more preexisting works and recasts or adapts those preexisting works in some way. Here again, the creator of the derivative work must add sufficient amounts of original, creative effort to the preexisting material so that a new, copyrightable work is created. (But this doesn't mean one is always free to make a derivative work. If the underlying work is protected by copyright, making a derivative work from it without consent can amount to copyright infringement, discussed *infra*.)

### *Tangible Medium*

Finally, in order for copyright protection to apply, the original work of authorship must be fixed in a tangible medium. In other words, the work must be embodied on paper, film, tape, computer disk, or other medium such that the work can be reproduced. Copyright law does not protect sounds or images of purely transitory duration, such as a live broadcast of an impromptu news report. The report would be fixed, however, if it had been written on paper, videotaped in advance, or taped, at the author's direction, simultaneously with the broadcast transmission. Live sports broadcasts typically are protected by copyright because the broadcasts are simultaneously fixed in tangible form, on video- or audiotape.

To use another example, a college professor's spontaneous lecture, though certainly an original work of authorship, would not qualify for copyright protection because of the lack of fixation. But a lecture could indeed meet this basic copyright requirement if the lecturer were operating from a set of notes or taping the performance. Also, although a lack of fixation would preclude copyright, the speaker is not left totally unprotected by law. For example, the law of commercial appropriation, discussed in Chapter 5, could prevent unauthorized people from commercially marketing the comments under the speaker's name.<sup>8</sup>



### ***The Law of Ideas***

As noted earlier, copyright requires a work of authorship. Ideas in and of themselves are *not* protected by copyright law. Yet novel ideas—such as ideas for books, TV shows, and screenplays—can be valuable. The law of idea submission and idea theft is an outgrowth of *contract* law, not copyright. In most cases, ideas are not protected unless the parties enter a contract in which the company entertaining the idea specifically agrees to pay the party submitting the idea if the idea is used in a production. Having originated in the entertainment industries, the law of ideas is well developed in New York and California.

In recent years many idea-theft claims have arisen over ideas for reality-TV shows. Plaintiffs claiming their ideas were stolen rarely succeed in court, however, because typically other people proposed similar ideas, and the legal doctrine of “independent creation” negates a plaintiff’s claim.<sup>9</sup> Many literary publishers and film and TV production companies have lessened the threat of idea-theft claims by instituting policies that unsolicited submissions will be returned unopened unless they were sent by respected agents in the field.

## **OWNERSHIP**

Ownership of copyright can be an extremely valuable property asset. Sometimes this value is a function of time, such as when the early recordings of a musical group become more marketable as the group gains stature over the years. Or the work could be of significant value immediately, even when the creator is not well known. An example of this is Abe Zapruder’s historic film of President John Kennedy’s assassination, which was purchased by Time, Inc. In some cases, copyrights are marketed for significant value even before they are finished. In 1988, for example, Warner Books bid nearly \$5 million for the right to publish the authorized sequel to *Gone With the Wind*, even though the book would not be completed until 1991. Copyright ownership, then, is something to be taken seriously.

Contrary to popular belief, initial ownership rights in copyright are not acquired through any formal procedure, such as registration or public notice. Rather, copyright ownership begins at the moment a work that can be protected is created. Public notice and government registration are significant for other reasons, as explained following, but ownership accrues without these formalities.

Another basic principle to remember about copyright ownership is that it is entirely distinct from ownership of the physical object that embodies a copyrighted work. Therefore, ownership of the tangible object does not necessarily include ownership of the copyright. For example, courts have held that when the writer of a letter sends the letter to another person, the recipient becomes the owner of the physical object—the actual piece of paper. But absent an agreement to the contrary, the writer typically retains copyright ownership over the contents.

Thus the recipient would not have the right to publish the letter, absent an understanding to the contrary.<sup>10</sup>

### **Work Made for Hire**

Generally speaking, when an individual writer or artist creates a work, she immediately becomes the original owner of the copyright. When the work is created at the behest of someone else, however, initial ownership may belong to the buyer rather than to the individual creator of the work. The key legal question is whether the creator was acting as an employee of the buyer. If so, the copyrightable material is called **work made for hire**, and ownership vests automatically with the employer, absent an agreement to the contrary.<sup>11</sup>

Typical work-for-hire materials include the stories written by staff reporters at a newspaper, the video shot by camera operators at a TV station, and the diagrams created for a magazine by its full-time graphic artist. In these cases the creators are formal, salaried employees, and the copyright to the works they produce within the scope of their employment belongs to their employers. But in many cases, such as with freelance artists working on assignment, determining whether works are made for hire has been a cloudy legal question.

In the 1989 case of *Community for Creative Non-Violence v. Reid*<sup>12</sup> the U.S. Supreme Court helped clarify the meaning of “employment” under the work-for-hire doctrine. The Community for Creative Non-Violence (CCNV), a non-profit organization concerned with homelessness in America, hired artist James Reid to produce a sculpture for a display that would dramatize the plight of the homeless. Reid and CCNV reached a general understanding about how the sculpture would look and how much it would cost. But the parties had no agreement about who would own the copyright; that topic was never mentioned.

Reid worked on the sculpture for two months and, during that time, CCNV members occasionally visited the studio to check on his progress and make suggestions. Reid delivered the completed statue of three human figures to CCNV for use in a Christmastime display. Reid was paid \$15,000 for his work. After the display CCNV returned the statue to Reid for minor repairs and began making plans to take the work on a nationwide fundraising tour. But when CCNV asked Reid to return the sculpture, he refused, claiming he owned the copyright. CCNV sought a court order requiring Reid to return the sculpture.

The copyright question hinged on whether Reid was an employee of CCNV, in which case CCNV would own the copyright, or whether he was an independent contractor, in which case Reid would retain the copyright. It is essentially a distinction based on which party maintained the greatest degree of control over creation of the work. The Supreme Court held that whether a person is an employee for copyright purposes is to be determined by examining several factors, such as which party supplies the instrumentalities and tools, the location of the work site, the length of the working relationship between the parties, the hiring

party's right to control how the work is accomplished, and the extent of the artist's discretion over when and how long to work.

By applying these factors, the Court concluded that Reid was not an employee but an independent contractor. Reid worked in his own studio in another city and supplied his own tools; he was retained for only two months; he had absolute freedom to control his work schedule; and CCNV was not in a position to supervise the work closely. Therefore, without a formal agreement that the work would be considered made for hire or that the copyright would be assigned to CCNV, Reid retained the copyright to his work.

Despite the Supreme Court's list of factors, though, the work-made-for-hire doctrine still carries an aura of uncertainty. Furthermore, as a practical matter, many communications professionals are entirely unfamiliar with the doctrine and do not even think about copyright ownership until a dispute arises. A common point of contention, for example, is whether the copyright in an advertising design belongs to the client advertiser or to the ad agency that created it. Controversies have also arisen over whether the materials created by student newspaper staffs are owned entirely by the schools or whether the individual students retain the copyright to their works. Such disputes and uncertainty over copyright ownership can almost always be avoided if the parties simply enter a written agreement in advance, designating who the owner will be.

For one common scenario, though, the Copyright Act does provide greater certainty. When a freelancer is commissioned to contribute to a collective work, such as a magazine or newspaper, the contribution is a work made for hire only if the parties expressly agree in writing to that designation.<sup>13</sup>

### ***Joint Authorship***

Sometimes works entitled to copyright protection have more than one author. The Copyright Act calls these **joint works**, defined as material "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."<sup>14</sup> In such cases the authors are co-owners of the copyright and share in its profits. A common example of this is the musical composition for which one person writes the lyrics and another creates the melody. Another example would be a textbook on which two or more authors collaborated, each writing a portion of the chapters.

Note that the intent of the authors is critical to the definition. For the product to qualify as a joint work, the authors must have intended to merge their efforts into a cohesive product at the time the work was created. If a composer created a tune as an instrumental solo, for example, a lyricist's addition of words sometime later would not convert the song into a joint work. The later version would be a derivative work.

Though Congress provided a definition for joint works, it did not attempt to specify all the rights and duties of the co-owners. That task was left for the courts,

and it has been filled with difficult questions. For example, does each joint author own an equal interest in the joint work, regardless of the author's level of contribution? (Generally, yes.) May one joint owner, without the consent of the other joint owners, authorize outsiders to copy the work? (In most cases, yes.) May one joint owner transfer his entire share to another party, without the other joint owners' consent? (Yes, absent an agreement to the contrary.)

The joint ownership picture can be further complicated in the eight community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington). Community property is a form of marital ownership whose basic tenet is that any property earned by one spouse during marriage is automatically co-owned by the other spouse. This rule applies to copyrights created or otherwise acquired during marriage, unless husband and wife entered a written agreement to the contrary. Therefore, the spouses of joint authors also may acquire joint ownership privileges in their own right.

In determining the rights of ownership of joint works, the courts generally have adopted the rules that apply to other kinds of property, such as real estate. It is a highly complicated area, and the details are well beyond the scope of this book. But two general points are worth remembering: First, joint copyright ownership, profitable though it might be, is also a formula for legal complications down the road. These complications typically arise when the creative team breaks up, perhaps after the death of one member, and the joint owners, including the heirs of the deceased member, disagree over how the copyright should be marketed.

Second, legal problems can be avoided to some extent if the joint authors enter a written agreement spelling out the terms of their relationship in advance. These are **collaboration agreements**, and they are enforceable contracts. Vital to any well-drafted agreement is a section concerning how the copyright will be owned and managed. For example, an agreement might stipulate that no one author may grant outsiders permission to use the copyrighted work without the consent of all joint owners. Collaboration agreements also are useful for clarifying such non-copyright matters as how the joint authors will divide the expenses and share the income, how the team's production and decision-making process will work, and how the credits will appear on the work.

### **Government Works**

Works of the U.S. government, such as reports, consumer publications, films, regulations, and judicial opinions, are specifically precluded from copyright ownership.<sup>15</sup> Such taxpayer-funded works may be copied and used by anyone, barring some other legal restriction. However, this rule applies only to works created by federal government employees as part of their official duties. Materials prepared for the government by private consultants are protected. Also, the federal government is not precluded from owning copyrights that are transferred to it—for example, by bequest.

Nothing in the Copyright Act prevents state or local governments from owning copyrights to the works created by their employees. However, as a practical matter, governments rarely seek to enforce the prerogatives of copyright ownership against citizens. Also, as to official government enactments, such as statutes, courts have ruled consistently that these are not copyrightable.<sup>16</sup>

### ***Duration of Ownership***

The U.S. Constitution gives Congress the power to protect copyrights “for limited times.” The 1976 act specifies the periods of protection for works created after January 1, 1978. When the applicable period expires, the work falls into the **public domain** forever. This means that the copyright can never again be owned; the work is available to be freely copied or published by anyone without fear of infringing on copyright, unless Congress takes special action to restore protection.

In 1998 Congress passed the Sonny Bono Copyright Term Extension Act, which amended the 1976 act by adding 20 years of protection for most works. The general period of protection is the lifetime of the author, plus 70 years. For works made for hire, it is 95 years from the year of first publication or 120 years from the year of creation, whichever occurs first.

Works created prior to 1978 may have different terms of protection, however, because they initially were governed by the federal Copyright Act of 1909 or by state common law, both of which specified ownership durations different from the modern act. Under the 1909 act, federal copyright protection began when the work was published or registered, and it ran for an initial period of 28 years. The author then could renew for one more 28-year term. The 1976 act contains special duration provisions for works that were under a preexisting copyright term as of January 1, 1978, in an attempt to bring the terms of protection into greater conformity with the new law. Under these special provisions, the term of protection differs according to whether the work was published or unpublished as of 1978 and whether a renewal application had been filed in accordance with the 1909 act.<sup>17</sup> See Exhibit 8.2 for a summary of copyright durations.

Sometimes it’s easy to determine whether the copyright protection for another’s work has expired; but other times it’s hard. Copies may have been published with missing or incorrect copyright notices, for example. Such irregularities could easily lead a person to miscalculate the duration of protection. Therefore, it is highly advisable to consult a qualified attorney before copying works on the assumption that they are in the public domain. A search of Copyright Office records may be necessary, and a lawyer may need to analyze documents pertaining to the ownership and transfer of a copyright.

Copyright protection in a work may be cut short if the copyright owner voluntarily places it into the public domain. Under the modern copyright statute, however, you cannot assume that a work belongs to the public domain absent a specific direction from the owner, such as “I hereby grant this work to the public

## EXHIBIT 8.2 Copyright Duration

<b>Category of Work</b>	<b>Term of Protection</b>
Published prior to 1923	Copyright has expired
Published 1923 to 1963	95 years, if renewed in 28th year
Published 1964 to 1977	95 years
Created, but not published, before 1978	Author's life plus 70 years
Created 1978 or later, by sole author	Author's life plus 70 years
Created 1978 or later, by joint authors	Life of longest-living co-author plus 70 years
Created 1978 or later, as work for hire	95 years from year of first publication or 120 years from creation, whichever comes first

*Note: This exhibit does not list all possible copyright terms.*

domain.” Even for works governed by the prior statute, extensive distribution and news media coverage does not signal a lack of copyright protection. For example, a federal appeals court held in 1999 that Dr. Martin Luther King, Jr. did not place his famous “I Have a Dream” speech into the public domain when he delivered it in front of the Lincoln Memorial in 1963—even if 200,000 people were present and millions more were listening via live radio and television.<sup>18</sup>

When the late musician-turned-congressman Sonny Bono sponsored the bill to extend copyright terms by twenty years, it proved a highly contentious proposal. The extension was urged by the motion picture industry and perhaps most strongly by the Walt Disney Co., which could see Mickey Mouse, Goofy, and other valuable characters nearing the end of their copyright protection terms. But many librarians, academics, Internet publishers, and others who prefer public domain expansion were strongly opposed.

After the term extension was enacted in 1998, a number of publishers who specialize in reproducing public domain materials challenged the constitutionality of the new law. The plaintiffs claimed that the longer copyright terms exceeded what the Constitution’s copyright clause meant by “limited times,” that applying the extension retroactively to existing works did not promote *future* creativity as intended by the Constitution, and that the extension also violated the First Amendment rights of those who would otherwise make use of the works. In 2003 the Supreme Court upheld the term extension, however, in *Eldred v. Ashcroft*.<sup>19</sup> In the 7–2 ruling, the Court said Congress had acted rationally and within its authority, noting that the twenty-year extension brought the

United States in line with copyright duration in the European Union and that Congress had an unbroken history of applying any copyright term extensions to existing works as well as future ones so that all copyrights would be governed evenhandedly under the same regime.

### ***Moral Rights***

Historically in the United States, the owner of a copyrighted work enjoyed virtually complete freedom to treat it as she or he wished—to edit it, change its color, alter its title, even to destroy it. However, this prerogative of ownership raises serious ethical questions when the owner is not the original creator of the work and the work is a piece of significant art. Painters, sculptors, photographers, and filmmakers do not always own the copyrights to their works, having transferred the ownership to others or created the material as work for hire. But these artists often feel emotional attachment to their work, their reputations are connected to the work, and they—rather than owners whose main concern may be a financial investment—are considered the best arbiters of artistic form. Therefore, artists in the United States have lobbied with increasing intensity in recent years for the recognition of some perpetual moral rights to their works, distinct from the rights of copyright ownership. Institutional owners of copyrights have opposed any changes in the law that would diminish their traditional rights to alter and market their property as they see fit.

**Moral rights** of artists have long been recognized by law in some other countries, particularly in Europe. The concept, first developed by French courts in the early 1800s, typically involves two components: (1) a right to attribution, meaning the right of an artist to control the use of his name in association with the work; and (2) a right to integrity, meaning an artist's right to control alterations and prevent distortion or destruction of the work.

Since 1928, protection of moral rights has been a tenet of the international Berne Convention copyright agreement. When the United States joined the convention in 1989, this country was required to recognize moral rights or risk falling into noncompliance. Initially, Congress declined to add specific moral rights provisions to the Copyright Act, concluding that adequate protection could be achieved through an existing patchwork of rights arising under contract law, privacy law, defamation law, unfair competition law, and a handful of state statutes protecting moral rights.<sup>20</sup>

But in 1990 Congress enacted the Visual Artists Rights Act, or VARA, amending portions of the Copyright Act to provide some limited federal protection for moral rights.<sup>21</sup> The law protects both a right to attribution and a right to integrity. Artists have a right always to be known as the creators of their works, as well as a right to prevent use of their names on modified versions of their work if the modifications could harm their reputations. Artists also have the right to prevent any intentional distortion or mutilation of their works.

VARA is narrow in its scope, however—narrower than the protections called for in the Berne Convention. The act applies only to paintings, drawings, prints, sculptures, and exhibition photographs and only if they exist in a single copy or in limited editions of no more than two hundred copies. Furthermore, the moral rights provisions do not apply if the works were made for hire, and the term of any moral rights protection is limited to the life of the artist.

## FORMALITIES

For an asset that can be worth huge sums of money, copyright ownership is remarkably simple to originate; it is basically self-executing. Ownership begins automatically as soon as work is fixed in a tangible medium. There is no need for prior investigation or approval by a government agency. However, two optional formalities—registration and notice—do offer significant advantages for the copyright owner.

### *Registration*

The owner of a copyright may register it with the federal government at any time within the life of the copyright, either before or after publication. Registration is obtained by sending to the Copyright Office the following items: (1) a completed registration form, (2) the appropriate filing fee, and (3) a nonreturnable deposit of the work being registered.

In 2009 the Copyright Office was working to complete a significant transformation of the registration process. With a new information-technology system installed, the office began shifting away from paper registration forms and toward online registration. Copyright holders may still obtain and mail back paper forms for registering their works, but online registration is encouraged by a lower filing fee, faster processing times, and a status tracking service. Registration guidance, including the applicable fee options, is provided on the Copyright Office website, [www.copyright.gov](http://www.copyright.gov).

The Copyright Office on average processes some 550,000 registration applications per year. The office briefly examines each application to determine that all requested information has been provided and that the material is of a copyrightable nature. A certificate of registration is issued, effective the date application materials were received.

Though not a requirement for ownership, registration establishes a public record of the copyright claim and serves as court evidence (though not necessarily conclusive evidence) of the validity of ownership. Furthermore, registration is necessary before the copyright owner may file an infringement suit in court. If the registration is made promptly—within three months after publication of the work or prior to an infringement—the owner may collect attorneys' fees and certain statutory damage amounts from infringers. (Otherwise, only an award of



actual damages and profits is available to the copyright owner. These remedies are discussed in more detail *infra*.)

### **Copyright Notice**

A proper copyright notice should be affixed to all publicly distributed copies of protected works, and it should appear in a position where the public would reasonably look for it. Notice consists of the following elements:

1. The word *copyright*, or the international symbol © (or in the case of sound recordings, the letter *P* in a circle)
2. The year of first publication
3. The name of the copyright owner

Traditionally, failure by the owner to affix a notice on all publicly distributed copies of a work meant automatic loss of copyright protection. Legally speaking, lack of notice was taken as a signal that the owner was allowing the work to pass immediately into the public domain. The 1976 act was less harsh than the earlier law; it allowed copyright ownership to continue if the notice was omitted only from a small portion of the distributed copies or if the owner made an effort to add the notice as soon as the omission was discovered.

In accord with the Berne Convention, however, notice became entirely optional for works publicly distributed after March 1, 1989. The Copyright Act now reads that a copyright notice “may” be placed on publicly distributed copies.<sup>22</sup> The main legal advantage of including a notice is that it warns potential infringers and prevents a copyright infringer from receiving leniency on grounds of innocent infringement.

## **INFRINGEMENT**

It was noted previously that a copyright owner possesses a virtual monopoly over the protected work. More specifically, the owner is accorded by law a bundle of exclusive, overlapping rights. Only the owner may do, or authorize others to do, any of the following with respect to the copyrighted work:

- Display publicly
- Distribute publicly
- Reproduce
- Adapt (prepare derivative works)
- Perform publicly<sup>23</sup>

Copyright infringement occurs when one or more of these exclusive rights of ownership is violated. For example, professional photographer Art Rogers of California produced a photo of a married couple posed on a bench with their eight German shepherd puppies. The memorable picture, titled *Puppies*, was exhibited in art museums and then licensed by Rogers to be reproduced on

notecards. A few years later Jeff Koons, a well-known New York sculptor who had purchased some of the notecards, produced a sculpture modeled directly after the photograph, without the photographer's consent. Three of the sixty-two-inch-long sculptures were sold for a total of \$367,000. When Rogers learned of this, he sued Koons for infringement.

In his defense, Koons argued that no infringement occurred because copyright protection was limited to use of the work as a photograph. But the District Court disagreed. The manner in which Rogers arranged his subjects and carried out his photographer's art constituted a protected, original act of expression, the court held, and reproduction in sculpture form violated Rogers' exclusive right to make derivative works. A change in medium did not avoid infringement.<sup>24</sup>

To prove infringement, plaintiffs must first show that they indeed own a valid copyright interest. The next step is to establish that the defendant engaged in substantial, unauthorized copying from the protected work. This is easily accomplished when exact reproduction is involved, as would be the case if a radio news director conducted his show by reading stories word for word from the local newspaper (the problem illustrated in the Chapter 1 Hypothetical).

More commonly, though, lawsuits involve some altered use of the protected material. In such cases infringement typically is proved by two-pronged evidence: access to the copyrighted work coupled with substantial similarity.

### ***Substantial Similarity and Access***

Substantial similarity is a matter of degree, to be decided by the jury. Suppose, for example, that the radio news director obtained her material from the local newspaper but altered the wording somewhat. In an infringement case brought by the newspaper, the jurors would be asked to compare the newspaper stories with transcripts of the radio reports and decide whether the allegedly infringing work bears a remarkable resemblance to the plaintiff's stories.

The jury must distinguish between similarity in the underlying facts or ideas and similarity in manner of expression. Only in the latter case is the similarity evidence of copyright infringement. It would be entirely permissible, for example, for the radio announcer to take facts from the newspaper stories and rework the manner of expressing them. Facts, remember, are not copyrighted and therefore cannot be infringed.

A case for infringement must also establish that the defendant had access to the copyrighted work prior to creating the alleged infringement. It is possible, after all, that the defendant, working independently, created a substantially similar work. Such a creation would not infringe copyright. But if the defendant had previously seen or heard the copyrighted work, the jury may legally conclude that the similarity was indeed the result of copying.

Access may be established by circumstantial evidence, such as a defendant's subscription to the newspaper in which an allegedly infringed story appeared.

Furthermore, it is not necessary to show that a defendant copied directly or intentionally from the protected work. One high-profile case found that illegal copying had occurred subconsciously: In 1976, a federal court held that musician George Harrison, formerly of the famous rock group the Beatles, had infringed a tune recorded previously by the Chiffons. Harrison's song, "My Sweet Lord," contained a melody almost identical to portions of the earlier work "He's So Fine." No evidence suggested that Harrison deliberately copied from the Chiffons or that he was even specifically aware of their tune. Yet the court concluded that Harrison had indeed heard the song at some point, and that "his subconscious knew . . . a song his conscious mind did not remember."<sup>25</sup>

### **Enforcement**

When a copyright is being infringed, the first step for the owner in most instances is to send a cease-and-desist letter to the culprits, informing them of the owner's rights and demanding a stop to the unauthorized use. Most infringements are resolved out of court through an initial letter, some telephone negotiations, and perhaps a settlement agreement.

Should these efforts fail, a copyright owner whose works are being infringed upon also has several remedies available through the courts. The first is an injunction ordering the defendant to stop using the owner's work. The injunction, issued by a federal district judge, is a relatively quick remedy intended to prevent further harm to the owner's copyright interest.

A copyright owner also may sue an alleged infringer to obtain actual damages and profits. Actual damages is a sum of money equal to what the owner lost as a result of the infringement. For example, if a college professor without permission photocopied a textbook and provided free copies to his students, the publishing company would not make the money it otherwise would have from sales. This lost amount would equal actual damages. Sometimes the plaintiff's actual loss is not nearly as much as the infringer's wrongful gain, however. In this case, the plaintiff also may be awarded an amount representing the defendant's additional profits from use of the copyrighted work. For example, suppose the professor had sold photocopies of the pilfered manuscript to students at a price nearly double the retail price of the book. The publisher could sue to collect the infringer's extra profits.

Instead of collecting actual damages and profits, a copyright owner may elect to recover **statutory damages** from the infringer. This is particularly likely when the amount of the owner's actual loss, or the defendant's profits, is negligible or hard to determine. In such cases the Copyright Act nevertheless specifies amounts the owner may be awarded. For non-willful infringement, the amount ordinarily is between \$500 and \$20,000, at the judge's discretion, for each work infringed. If the copyright owner can prove the infringement was committed willfully—with full awareness of its illegality—the statutory award may go as high as \$100,000.<sup>26</sup>

For example, in a 1984 case several record companies together sued for willful infringement of thirty-five copyrighted sound recordings. Defendants were found to have produced counterfeit copies of the recordings—exact copies made and marketed without permission. The plaintiffs were able to prove actual damages and infringer profits of less than \$100,000. But the judge granted statutory damages at near the maximum allowable, for a total of \$1.5 million.<sup>27</sup>

If done willfully and for purposes of financial gain, copyright infringement can also amount to a criminal offense. Willful infringers may be indicted and prosecuted under federal criminal statutes, in addition to the civil proceedings described previously. If convicted, first offenders generally face fines of as much as \$25,000 and/or imprisonment for as long as a year.<sup>28</sup> Criminal prosecution is most likely in piracy cases, where counterfeit copies of tapes, films, or other materials are produced and marketed in blatant disregard of their copyright protection.

Clearly, copyright infringement can become an expensive and embarrassing legal problem for the infringer. Recall that in the chapter *Hypothetical*, your commercial included a musical composition and previously published photos, likely protected by copyright. And, under the principles discussed so far, their unauthorized use in the commercial—a form of reproduction—would amount to infringement. The best way to avoid infringing someone else's copyright and still get to use the work is to get written permission from the owner.

## LICENSING AGREEMENTS

The rights of a copyright owner may be transferred to other individuals or organizations, just as other kinds of property may be sold or given away. The owner need not transfer the entire copyright interest, however. A copyright can be divided and subdivided into small packages, each sold independently. This is referred to as the divisibility of copyright or, more graphically, as the salami theory. The original owner of a copyright begins with the whole salami and can sell it all, as is. Or it can be divided up into little slices, with the original owner perhaps retaining the main portion.

These small pieces of a copyright might include, for example, the right to reprint excerpts, the right to adapt into a screenplay, the right to publish first in the western United States, or the right to distribute the work for one year. The transfer of limited copyright interests in this piecemeal fashion, with the primary owner retaining the bulk of the rights, is referred to as copyright **licensing**. The grantor of the license is called the licensor, and the party receiving the license is the licensee.

Copyright license agreements are usually negotiated contracts, and they may be exclusive or nonexclusive. An exclusive license is one in which the licensee is granted the sole authority to exercise the particular right in question. The license may be limited geographically or in duration. But as long as the license is in

effect, no other person or organization—not even the principal copyright owner—may possess the same right. If the license is nonexclusive, on the other hand, the copyright owner may grant identical rights to additional parties.

Exclusive licenses typically carry a much higher price tag. For example, a radio station would expect to pay more for the exclusive right to broadcast a syndicated talk show within a certain geographic area than for the right to become one of perhaps three or four local stations carrying the program. Another distinction is that exclusive licenses must be in writing to be valid; nonexclusive licenses sometimes may rest entirely on oral agreements.<sup>29</sup>

In the entertainment industries, copyright licensing plays a huge role, both as a way for the owners of copyrights to reap profits and as a way for other creators to obtain material for their projects. For example, suppose a motion picture company wants to produce a film about a warty, bug-eyed creature from outer space that charms youngsters on Earth. Pulling this production together may require the acquisition of several copyright licenses. Most notably, the production company will need to purchase motion picture rights from the author of the underlying screenplay (or novel, if the movie is based on a book). This license may cost anywhere from \$50,000 to \$10 million, depending on the bargaining power of the author. In addition, the producer may wish to integrate several pieces of recorded music into the film. This would require licenses from the owners of the musical compositions and the recorded performances.

When the film production company finishes its project, however, it will have created substantial copyright interests of its own. In addition to licensing distribution of the picture, the producer might license to a T-shirt company the right to market shirts with the space creature's face painted on the front. This kind of copyright license is called a grant of merchandising rights.

Copyright licensing can be an extremely complicated matter of contract and property law, and the agreements are often negotiated by lawyers who specialize in this field. That isn't always the case, however. It is common, for example, for the writer of a freelance magazine article to deal directly with an editor when determining what particular rights will be transferred to the magazine; the copyright stipulation might be stated in a simple sentence or two.

It is also true that communications professionals, in a rush to agree on an exciting project, sometimes neglect important details about the duration, scope, and exclusivity of the copyright transfer. Such oversights can eventually lead to protracted legal conflict between the parties. Furthermore, inattention to the copyright transfer may be tantamount to squandered commercial opportunity. For example, a freelancer might write an essay and hastily sell it to a newspaper for \$300, without specifically reserving any of the copyright. This apparent transfer of all rights would allow the newspaper to syndicate the essay to dozens of other publications and pocket \$3,000 in proceeds. The freelancer could have preserved the right to exploit the additional markets personally, following the initial

publication, had an agreement with the newspaper editor contained language such as the following:

In exchange for consideration of \$300 paid to [freelancer's name], the *Daily News* is hereby granted a license of first North American serial rights to the essay titled "I Like Copyright." All other rights are retained by the author.

### **Electronic Rights**

In recent years many copyright disputes have involved increasingly important electronic rights—the permission to make additional uses of copyrighted material in DVDs, websites, e-mailed newsletters, electronic books and similar media. Copyright creators and publishers alike have had to learn that electronic rights must be distinctly addressed and separately negotiated.

This is at least one of the lessons from the contentious case of *Tasini v. New York Times Co.* Six freelance authors were unhappy when they learned that articles they had written for the *Times*, *Newsday*, and *Sports Illustrated* were in turn being provided to the database NEXIS and similar databases. The authors believed this was a separate publication of their writings for which they had not given a license and for which they had not been paid. The publishers, on the other hand, argued that providing electronic files to the databases was simply a "revision" of the periodicals to which authors submitted their material and for which they had been paid. The Copyright Act specifically grants the owners of collective works, such as newspapers and magazines, a privilege to republish copyrighted elements in "any revision of that collective work."

The general practice of the publishers was to negotiate deadlines, length, and price with each freelancer. But they did not specifically mention the copyright terms. So, when the authors sued for copyright infringement, it was up to the courts to interpret the Copyright Act and decide the scope of the freelancers' licenses. For this, the case progressed all the way to the Supreme Court.

In a majority opinion by Justice Ruth Bader Ginsburg, the Court in 2001 held that the database distribution in question was not a mere conversion or revision of the periodicals from one medium to another. The databases offered a substantially different service of individual, searchable articles, not intact periodicals. The databases were text-only format, without the context of the original print publications, and they presented huge files of articles in this manner. "The Database no more constitutes a 'revision' of each constituent edition than a 400-page novel quoting a sonnet in passing would represent a 'revision' of that poem," Ginsburg wrote.<sup>30</sup>

It was left to the district court to determine the appropriate legal remedy for the plaintiff freelancers, however. And the legal wrangling continued. The *New York Times* decided to play hardball: It would delete freelance articles from the digital files provided to databases unless freelancers specifically agreed to their articles' inclusion without additional compensation.

Another 2001 case presented a similar electronic rights issue. A freelance photographer for *National Geographic* sued the magazine for copyright infringement when he found that a cover photo he had originally licensed to the publication was included on a CD-ROM of back issues. Unlike the databases at issue in Tasini, however, *National Geographic's* CD-ROM presented photos and articles together in the context of the original print version of the magazines. Nevertheless, the Court of Appeals in *Greenberg v. National Geographic Society*<sup>31</sup> held that the CD-ROM was not a mere revision of the original print issues but rather a new collective work for which the publisher needed to secure a separate copyright license. The case seemed to turn on the fact that the CD-ROM contained special animation features not contained in the print magazines.

### **Creative Commons**

Increasingly useful in the Internet environment has been a licensing scheme provided by Creative Commons, a nonprofit organization that aims to make it easier for copyright owners and users to have a meeting of the minds, thus increasing the body of work that can be freely and easily shared. Through [creativecommons.org](http://creativecommons.org) copyright owners interested in sharing can label their works with certain conditions for that sharing that essentially amount to conditions for a free license. Conditions may include, for example, attribution required, noncommercial uses only, and no derivative works.

## **MUSIC LICENSING**

Music is important to so many productions, from radio and TV commercials to corporate videos to TV programs to feature films. Its licensing is a particularly complicated area of copyright law. A few of the basic principles and practices are presented here.

It is critical to understand that there are typically *two* copyrights in a single piece of recorded music. One is in the musical composition itself—the notes and lyrics. This copyright is usually owned by an individual music writer or by a music publishing company. The second copyright is in the particular recorded performance of the music, referred to as a **sound recording**. This copyright is usually owned by a record company and occasionally by the recording artist. Integrating a particular sound recording into a commercial or film therefore requires two separate permissions, or licenses.

This principle of dual copyrights is important to the chapter Hypothetical, for example. You sought to avoid purchasing a license for the sound recording by re-recording the song with your own musicians. But in order to include the song in your TV commercial you would still need permission from the copyright owner of the underlying musical composition.

Music licenses come in many different forms; following are three of the most important.

### ***Synchronization License***

Whenever the producers of audiovisual works wish to incorporate existing music, whether for a film, TV, or Internet production, they must obtain a license from the copyright owner of the musical composition. This is called a **synchronization license**—the permission to integrate music in a video production.

Synchronization licenses are obtained from the individual music writers or publishers who own the copyrights to the songs – or from their designated licensing agents. Synchronization licenses are typically nonexclusive and granted for a flat fee determined in part by the value of the song and the prominence of the use. If a video producer intends to record his own rendition of the song, then the synchronization license may be the only music license he needs.

### ***Master Use License***

If, in addition to using a musical composition, a video producer wishes to use a particular artist's existing recording of the composition, then a **master use license** must also be obtained. A master use license authorizes reproduction of a “master” recording for use in an audiovisual production such as a TV program or commercial. (The term *master* recording refers to the final copyrighted recording from which records, tapes or compact discs are manufactured.)

Master use licenses are usually obtained directly from the record companies that own the copyrights in the sound recordings. Most record companies have special departments that negotiate and grant those licenses. The license fees are determined by a number of factors, such as the anticipated audience size, whether the recording will be featured or used in the background, and whether the use is for commercial or for nonprofit purposes.

### ***Performance License***

So far we have looked at licenses that convey permission to reproduce music in the creation of another work. The right to reproduce music in such a fashion is separate from the right to *perform* it publicly, however. Recall that one of the basic, exclusive rights of a copyright owner is the right publicly to perform the copyrighted work. Music is publicly “performed” when it is actually presented to an audience in a commercial setting. Examples of public performance include broadcasting a recording on the radio, playing recorded music in a nightclub or health club or shopping mall, broadcasting a TV show containing music, streaming music on a website, or singing a song live in a Las Vegas stage show. All of these presentations of music require a **performance license**. Even when retail establishments are merely playing a radio station for the benefit of customers (so-called storecasting) copyright permission may be required.<sup>32</sup>

Interestingly, while the owners of musical compositions have historically enjoyed this public performance right, the owners of sound recordings have not. Unlike most other classes of copyright, sound recordings by statute have *not*



### EXHIBIT 8.3 Copyright Licenses for Music

<i>You need a . . .</i>	<i>In order to . . .</i>
Synchronization license	Use a musical composition in a film or other new work
Master use license	Use a particular sound recording in a film or other work
Performance license	Publicly perform a composition, as by broadcasting a recording of the composition on radio

enjoyed an exclusive right of public performance.<sup>33</sup> That meant, for example, that when a radio station played a recording it owed a performance license fee to the owner of underlying song but not to the owner of the sound recording. This unusual situation has started to change, however. As a result of copyright statute amendments in 1995 and 1998, the owners of sound recordings now have a limited public performance right for certain digital transmissions, such as webcasting and satellite digital radio. Exhibit 8.3 summarizes the licenses needed under specific circumstances.

#### ***Performance Rights Societies***

As a practical matter, the individual owners of musical compositions would find it virtually impossible to police all “public performances” of their works and ensure that licenses were obtained. And on the other side, broadcast stations and other businesses would find it excessively burdensome to negotiate a license for each and every song they played. Therefore, performance licenses are handled in a different fashion—through performance rights societies that handle licensing on behalf of music copyright owners.

The two main performance rights societies in the United States are Broadcast Music, Inc. (BMI), organized in 1939, and the American Society of Composers, Authors and Publishers (ASCAP), founded in 1914. Together they license performance rights to millions of musical compositions on behalf of more than 150,000 songwriters and music publishers. Other performance rights organizations in the United States include SESAC (originally founded as the Society of European Stage Authors & Composers) and SoundExchange (for digital-transmission performances of sound recordings). In addition, all major foreign countries have their own performance rights organizations for licensing in those countries.

Essentially, the system works as follows: A music copyright owner applies to one of the performance rights societies for membership. In the membership agreement, the copyright owner authorizes the society to grant nonexclusive performance rights in the member’s compositions and to collect royalties on the member’s behalf. This is accomplished mainly through **blanket licenses**. Broadcast stations and other music-using businesses pay a yearly license fee to the performance rights organization, usually based on the gross receipts of the business.

For commercial broadcast stations, the fee for each license is equal to about two percent of a station's revenues. Payment of this fee entitles the licensee to a blanket license to broadcast any songs in the society's repertory. The fees collected by the performance rights society are then disbursed to its member copyright owners in the form of royalties. Royalty amounts are based on how frequently a particular member's music is performed, which is determined by statistical sampling of actual broadcasts across the country.

Practically speaking, most broadcast stations have little choice but to purchase licenses from both ASCAP and BMI, thereby permitting the broadcast of virtually any popular tune. Even in the case of a TV station that airs only syndicated programming, the performance licenses are necessary. This is because TV shows contain plenty of music and, when the producers of those shows obtain music synchronization rights, they usually do *not* also obtain performance rights on behalf of the stations that will actually "perform" the shows to the public. TV stations, in fact, are the leading source of license payments for music performance rights. In the future, the online application of this right is likely to play a key role in the music industry's financial health.

## **SPECIAL PROBLEM: CABLE RETRANSMISSION**

A bitterly debated copyright question arose with the development of cable television: May cable operators intercept and retransmit broadcast signals without having to compensate the broadcasters, producers, and other program copyright owners? Or does the retransmission of a TV signal amount to a separate performance of a copyrighted work and thus require a license?

As cable systems in the 1970s began using microwave technology to import distant signals, thus fragmenting local broadcasters' audiences, the broadcasters were embittered by what seemed an unfair competitive advantage enjoyed by cable. Whereas broadcasters spent roughly one-third of their budgets on programming costs, including copyright license fees, cable casters obtained much of their programming free. Acting as super antennas, cable systems simply plucked broadcast signals out of the air and retransmitted them to subscribers, for a fee. Producers and broadcasters whose shows were being transmitted around the country without consent argued for greater control over the distribution of their product.

Nevertheless, the U.S. Supreme Court held in 1968 and again in 1974 that simultaneous cable retransmission did not constitute a separate performance within the meaning of the 1909 Copyright Act. The Court viewed cable systems as antenna extensions for the TV viewer rather than performers of programming. Once a program is broadcast, anyone with the technical ability to intercept and relay it is free to do so, the Court said. And this included commercial cable operators.<sup>34</sup>

### ***Cable Compulsory License***

Conventional TV broadcasters pressed Congress for statutory changes. For distant broadcast signals—signals not originating in the cable caster’s service area—a complicated compromise was instituted in the 1976 Copyright Act: Retransmission of a distant broadcast signal is considered a separate public performance. But because Congress thought it impractical to require that cable operators negotiate licenses for every retransmission of a broadcast, the act provides for a **compulsory licensing** system.<sup>35</sup> It allows cable companies to retransmit copyrighted broadcasts without consent, provided that the cable caster pays a blanket license fee to the U.S. Copyright Office. The amount of the fee varies, depending on the gross receipts of the cable system. The compulsory license payment protects the cable operator against infringement claims as long as the retransmission is simultaneous with the original broadcast and the programming is not altered by the cable company.

After each year’s royalty fees are collected, the federal government is responsible for dividing them among the numerous copyright owners who file claim forms. The majority of the fund has been allocated to program syndicators and movie producers, with the rest going to sports leagues, commercial TV broadcasters, public TV, and music owners.

The compulsory license system covers only retransmissions of *broadcasts*; it does not cover programming assembled specifically for cable, such as MTV or HBO. Cable-originated programming is cleared for transmission through direct negotiations with the various copyright owners who hold rights to the programming (motion picture studios, for example).

The compulsory license is for distant signals only; the law did not require cable casters to pay a license for picking up the signal of local television stations. A later law, the Cable Television Consumer Protection and Competition Act of 1992, dictated that cable systems *must* carry the signals of local TV stations that request carriage. If a local station doesn’t request carriage, the cable caster wishing to deliver the signal must directly negotiate for retransmission consent.

### ***Home Satellite Act***

Under the Satellite Home Viewer Act of 1988, a similar compulsory license system was created for satellite retransmissions. The act has allowed the national satellite TV carriers DirecTV and DISH/EchoStar to become significant competitors to cable TV companies. The satellite carrier was authorized to retransmit a distant broadcast signal to certain areas of the country considered “unserved” by local, network-affiliated stations. This retransmission could occur without permission of the broadcaster or other copyright owners, as long as the satellite carrier paid statutory royalties to the Copyright Office for later distribution to the copyright claimants.<sup>36</sup>

The compulsory, distant-signal license for satellite was set to expire at the end of 2009 unless reauthorized by Congress. Broadcasters have argued that it is time to phase out the compulsory satellite license so that satellite carriers would negotiate market-rate copyright licenses for the distant broadcast programming just as the carriers do for their other programming.

The Copyright Royalty and Distribution Reform Act of 2004<sup>37</sup> created a system of copyright royalty judges whose full-time job is to determine rates for the various compulsory licenses and make fair distributions of the royalties collected by the Copyright Office. The first judges assumed office in 2006, replacing a prior, more cumbersome system of copyright arbitration panels.

## INTERNATIONAL PROTECTION

In today's global marketplace copyright protection is meaningfully effective only if it extends beyond the borders of the author's country. Without such protection, foreign copyright pirates can dump counterfeit copies into the marketplace without fear of legal reprisal. In fact, various estimates in recent years indicate that foreign rip-offs of U.S. creations are costing American companies tens of billions of dollars annually in lost revenues. Film and music companies are particularly concerned about a rise in Internet piracy around the globe.

But there is no such thing as an international copyright that will automatically protect creative works throughout the world. Instead, the legal mechanism necessary to allow copyright owners to enforce their rights in a foreign country is a treaty or trade agreement. In some cases the United States maintains bilateral copyright treaties and agreements with other nations. These are individual treaties between the United States and one other country, each granting reciprocal enforcement rights. More important, however, are the various multilateral treaties or agreements in which large groups of countries agree to basic copyright principles and vow to enforce the copyrights on works created or distributed in any of the signatory countries.



### Are You Infringing?

- Is the preexisting work protected by copyright?
- Has that work been copied or otherwise used to create a substantially similar work?
- Was a license obtained to use the preexisting work?
- If no license was obtained, does this use of the protected work qualify as a "fair use"?

### ***WIPO and WTO***

Traditionally, the international organization most involved in global copyright law has been the World Intellectual Property Organization (WIPO), an agency of the United Nations that is responsible for protecting and stimulating creativity around the world. WIPO administers several multilateral treaties, the two principal ones being the Berne Convention for the Protection of Literary and Artistic Property (called the Berne Convention) and the Universal Copyright Convention (UCC). The United States became a member of the UCC in 1955. More than seventy countries are members. The United States officially joined the Berne Convention, the oldest and most elaborate of all multilateral copyright treaties, in 1989. More than eighty countries have now ratified the Berne Convention, which began as a pact of ten European countries in 1886. American authors had urged participation in the Berne Convention for one hundred years, but until recently some features of U.S. copyright law, such as the duration of protection and the lack of moral rights recognition, were incompatible with the Berne rules.

More recently, because copyright and other forms of intellectual property protection have become key issues in trade negotiations, the World Trade Organization (WTO) has become a significant voice in international copyright standards and dispute resolution. WTO administers the Agreement on Trade-Related Aspects of Intellectual Property Rights, often referred to as TRIPS, originally signed in 1994. As its starting point, TRIPS requires member nations to adhere to the Berne Convention. But TRIPS in addition contains specific protection clauses for computer software and other forms of electronic copyright.

### ***Unfinished Business***

Even with the advancement of international treaties and trade agreements, copyright laws (and the inclination to enforce them) still vary widely among nations. China, today one of the world's largest and fastest-growing economies, has in recent years sought to correct its long reputation as a nation of copyright pirates. But despite enacting conforming statutes and its high-profile crackdown on unauthorized retransmissions of events during the Beijing Olympics, China has not impressed the international copyright community, and particularly not the United States. Each year the Office of the United States Trade Representative issues a report on copyright and other intellectual-property enforcement by U.S. trading partners. The 2009 report noted that 81 percent of infringing materials seized at U.S. borders are from China, and China was listed first in the report's "Priority Watch List" of offending nations. Said the report:

While the Chinese Government continues to provide increased attention to the IPR [intellectual property rights] environment . . . China's IPR enforcement regime remains largely ineffective and non-deterrent . . .

Of particular concern is the rise of Internet piracy in China, especially given its emergence as a leading nation in terms of the number of Internet, broadband and mobile device users.<sup>38</sup>

The U.S. Copyright Office supplies information on the current status of official copyright relations with other nations. But while progress has been made through these formal, nation-to-nation channels, the progress is slow and often hampered by broader political considerations.

Therefore, major copyright-producing organizations in the United States have had to undertake their own private initiatives to help protect their copyrights and their markets around the globe. These efforts have been focused in five areas: (1) protecting their own supply chains against security breaches, (2) improving technology to inhibit copying and filter out illegal digital files traversing networks, (3) lobbying for more protective copyright statutes, (4) filing lawsuits against infringers in hopes of achieving deterrence, and (5) education programs aimed at retailers, websites, and consumers.

Effective consumer education has proved to be a big challenge in a diverse global marketplace. Darcy Antonellis, senior vice president for antipiracy operations at Warner Brothers Entertainment, said in an interview with this book's author in 2007, "In education we have to hit the right nerves culturally, and that differs from country to country."

## FAIR USE

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The one major exception to a copyright owner's exclusive rights is the **fair use doctrine**. It gives people other than the copyright owner a limited privilege to use the copyrighted work without the owner's consent and without paying a royalty.

The fair use doctrine evolved from common law, beginning in the 1800s, as courts sought to balance the monopolistic rights of the copyright owner with the public interest in the dissemination of information. Beginning with the 1976 Copyright Act, the doctrine was formally incorporated into the U.S. statutes. Section 107 of the act codifies this important doctrine in the following language:

Notwithstanding the [exclusive rights of copyright owners], the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;

3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

## APPLYING THE FACTORS

Despite the statutory codification, fair use remains a relatively amorphous concept. It requires case-by-case determinations based on a weighing of the specific facts and the public interests at stake. Courts are left with considerable latitude to make equitable judgments, guided only by these four statutorily prescribed factors:

### 1. Purpose and Character of Use

With this factor, courts first identify the degree to which the unlicensed use serves some productive, publicly beneficial, “transformative” purpose, such as news reporting or teaching. Some such productive purpose typically must be present—as opposed to a use solely for entertainment purposes—in order for the use to be deemed fair. Additionally, courts look to whether the use is for a commercial, self-serving purpose or whether it is for a nonprofit or educational purpose. If the character of the use is predominantly commercial, this factor will weigh against fair use.

### 2. Nature of Copyrighted Work

Courts have drawn a variety of distinctions within the general confines of this second factor. Prior to the unauthorized use, was the work published or unpublished? (Not-yet-published works are considered deserving of greater protection, thus weighing against fair use.) Is the copyrighted work primarily factual or fictional? (Factual works, such as news stories, are more susceptible to fair use.) Is the work out of print and no longer available for purchase? (If so, copying is more likely to be fair use.)

### 3. Portion of Work Used

This factor has both quantitative and qualitative elements. Courts will look at how much of the protected work was copied in relation to its whole. The smaller the amount used, the more likely it will be a fair use. But even if small percentages were taken, this factor may weigh against fair use if the copied portions were clearly the most important, most marketable elements of the copyrighted work.

### 4. Economic Effect

Finally, courts consider whether the unlicensed use will adversely affect the copyright owner. If the use has significantly usurped a portion of the market for the

copyright, fair use will not be found. Courts have tended to consider the first and fourth factors to be the most important, and the fourth to be the single most important criterion for determining fair use.

Typical examples of fair use include quotation of excerpts in a book review for purposes of illustration; use in parody of some content from the work parodied; summary of a written speech or article, with brief quotations, in a news story; reproduction by a teacher or student of a small part of a work to illustrate a lesson; and incidental reproduction, in a TV news broadcast, of a copyrighted work located at the scene of the event being reported.

A case that caught the attention of college campuses and copy shops in 1991 was *Basic Books, Inc. v. Kinko's Graphics*. Several major book publishers sued the Kinko's photocopy chain alleging that Kinko's infringed the publishers' copyrights when it copied excerpts from books without permission, compiled them into course packets, and then sold them to college students. Kinko's claimed that its copying of excerpts was a fair use under Section 107 of the Copyright Act. The district court ruled that the commercial copying was not a fair use and awarded the plaintiffs \$510,000 in damages plus attorneys' fees and court costs. The court analyzed the four fair use factors as follows:

1. *Purpose and character of use*: "Although Kinko's tries to impress this court with its purportedly altruistic motives," the judge wrote, "the facts show that Kinko's copying had the *intended purpose* of supplanting the copyright holder's commercially valuable right."<sup>39</sup> Therefore, this factor weighted heavily against fair use.
2. *Nature of the copyrighted work*: The books copied were factual in nature, and the court noted that such factual works as biographies, reviews, and commentary are believed to have a greater public value than fictional works. Therefore, copying of factual works is better tolerated under the copyright law. This factor weighed in favor of Kinko's.
3. *Substantiality of portion used*: The book passages copied in this case ranged from 5 percent to 25 percent of the works—often including entire chapters and, in one instance, a total of 110 pages. This amount was "grossly out of line with accepted fair use principles," the court said in weighing this factor against fair use.<sup>40</sup>
4. *Effect of use on market*: Noting that Kinko's had two hundred stores nationwide, the court concluded that the copying practice in question unfavorably affected the plaintiffs' sales of their books and their collection of permission fees. Therefore, this important factor weighed heavily against Kinko's.

### **The Sony Case**

In 1984 and 1985, the U.S. Supreme Court decided two very difficult fair-use cases. The first of these, *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>41</sup>



focused on whether home videotaping of TV programs is permitted as a fair use. The lawsuit was filed by Universal Studios and Walt Disney Productions, owners of many copyrighted productions licensed for exhibition on network, local, and cable TV. In the late 1970s, the studios were distressed by the burgeoning use of videotape recorders, often for unauthorized recording of the plaintiffs' productions. Surveys showed that the machines were used primarily for "time-shifting"—recording a program to view it at a later time and then erasing it—though many viewers also were accumulating libraries of tapes. Wide-scale taping would reduce the future demand for TV airings of the taped programs, the studios feared.

Yet the studios chose not to sue individual consumers, recognizing that would be an inefficient and probably ineffective way to curb home taping. Rather, Universal and Disney sued Sony, the manufacturer of millions of Betamax recorders. Sony was a contributory infringer, the plaintiffs claimed, and they sought money damages and an injunction against manufacture of the recorders.

After a lengthy trial, the district court ruled in favor of Sony. The court of appeals reversed, holding that the studios were entitled to enjoin distribution of the recorders or to collect royalties on their sale. It was a seemingly intractable issue that begged for a statutory solution. But Congress failed to act. The Supreme Court therefore had to resolve the issue.

In a 5–4 decision, the Court ruled in favor of Sony, upholding the right to manufacture home recording devices without incurring copyright liability. In his majority opinion, Justice Stevens operated from this principle: that the mere sale of copying equipment is not contributory infringement if the product also has significant noninfringing uses. One common use of the Betamax satisfies this standard, Stevens wrote, because time-shifting in the home is a fair use. The Court briefly addressed the four fair use factors:

1. Time-shifting is generally done for a private, noncommercial purpose.
2. The copyrighted works were voluntarily placed on TV to be viewed free of charge by the general public.
3. Though entire works are copied, this doesn't have the usual effect of militating against fair use, because time-shifting merely enables viewers to see works they had been invited to witness.
4. Plaintiffs had not proved any actual harm. Fears that time-shifting would reduce audiences for telecast reruns were based on mere speculation the Court said.

Four justices disagreed with the majority's rather shallow fair use assessment. The dissenters looked to the sample fair use situations in Section 107 and concluded that the fair use doctrine is intended only for productive uses—uses that provide some added public benefit, such as incorporation into a news report or

teaching lesson. Time-shifting, though noncommercial, does not qualify as a productive use, the dissenters said. Furthermore, it should not be necessary for the copyright owners to prove actual harm. A potential of harm to the market for the copyright should be enough to militate against a finding of fair use. The studios had sufficiently identified potential harm in a number of ways, the dissenters concluded. For example, time-shifting could reduce the rerun audience and, consequently, the license fees available to the studios for repeated showings. Also, advertisers might be willing to pay only for “live” audiences, if they believe Beta-max viewers will delete the commercials.

In the end, it might be said that video machines with off-the-air taping capability are available in today’s marketplace by the margin of one vote at the Supreme Court. The *Sony* case also demonstrated the inexact nature of the fair use doctrine, and contributed little toward reducing the blurriness. A final word about *Sony*: Although the plaintiffs lost their case, the Court did not rule that all instances of home videotaping qualify as fair uses. The Court needed to identify only one such use, and it identified time-shifting. Neither *Sony* nor any other authoritative court decision supports the proposition that unauthorized copying for personal entertainment purposes is generally a fair use.

### ***The Case of Ford’s Memoirs***

A year after *Sony*, the Court made another attempt, in *Harper & Row Publishers v. Nation Enterprises*, to clarify fair use. Former President Gerald Ford had contracted with Harper & Row to publish his memoirs. The agreement gave Harper & Row the exclusive right to license prepublication excerpts. As the manuscript neared completion, the publisher negotiated a deal with *Time* magazine in which *Time* would pay \$25,000 in exchange for the right to excerpt 7,500 words from Ford’s account of his pardon of former President Richard Nixon. But shortly before *Time*’s exclusive was scheduled to run, a secret source provided the *Nation* magazine with a copy of the unpublished Ford manuscript. Working at a feverish pace in order to scoop *Time* magazine, editors at the *Nation* pulled quotes, paraphrases, and facts from the manuscript and published their own 2,200-word article titled “The Ford Memoirs—Behind the Nixon Pardon.” (About fifteen percent of the article was in the form of direct excerpts from the manuscript; the rest was journalistic synopsis written by the *Nation*.) As a result of the *Nation* story, *Time* canceled its article and refused to pay Harper & Row for the excerpt rights.

Harper & Row sued the *Nation* for copyright infringement and was awarded damages by the district court. But the court of appeals reversed, holding that the *Nation*’s newsworthy publication was a fair use. Once again, the Supreme Court had a chance to provide fair-use clarity. In a 6–3 decision, the Court sided with Harper & Row, ruling that the *Nation*’s unauthorized excerpts were not a

fair use. And in contrast to its *Sony* opinion, the Court provided a lengthy and more thorough analysis of the factors. Writing for the majority, Justice Sandra Day O'Connor first recited the principle:

We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.<sup>42</sup>

Justice O'Connor then weighed the fair use factors as follows:

1. *Purpose of use*: The general purpose of the *Nation's* use was news reporting, a typical fair-use activity. On the other hand, by publishing verbatim excerpts, the *Nation* in this case went beyond news reporting and actively sought to exploit the headline value of its own infringement, making a news event out of its unauthorized first publication. Therefore, the purpose of the use became largely commercial. The use had not merely the incidental effect but the intended purpose of supplanting the copyright holder's right to license first publication. In sum, then, the first factor was a close call but tended to weigh against fair use.
2. *Nature of copyrighted work*: The Ford manuscript was a factual, historical work, and the law generally recognizes greater latitude to copy factual works than works of fiction or fantasy, Justice O'Connor acknowledged. But this work also was unpublished, and the scope of fair use is narrower with respect to unpublished works, because it is of particular importance that an author control the timing and quality of the first public appearance of a work. The *Nation* intruded upon a work that was still deserving of confidentiality and a high degree of creative control by the copyright owners. Therefore, this factor also tilted against fair use.
3. *Substantiality of portion used*: In terms of raw amount, the passages actually copied by the *Nation*—about three hundred words—were a very small portion of the total Ford manuscript. That weighed in favor of fair use. On the other hand, Justice O'Connor said, this third factor also requires a qualitative evaluation. The passages concerning the Nixon pardon were recognized by the copyright holder as the focal point of the entire manuscript. From a qualitative perspective, the portion used was indeed substantial. In sum, this factor was a close call but weighed slightly against fair use.
4. *Effect on market*: This last factor, the single most important one, was not a close call. "Rarely will a case of copyright infringement present such clear-cut evidence of actual damage" to the marketability of the copyright, wrote Justice O'Connor.<sup>43</sup> Specifically, she referred to the fact that Harper & Row lost its contract with *Time* and its ability to market first serial rights to the Nixon excerpts.

The three dissenters, led by Justice Brennan, said the majority failed to distinguish between the use of information and the appropriation of literary form, thus leading to an incorrect result. For example, on the critical fourth factor, Brennan acknowledged that the *Nation's* publication led directly to *Time's* cancellation of the Harper & Row contract. But Brennan argued the cancellation was not caused by the publication of a few copyrighted quotes but by the legitimate publication of significant information and ideas from the Ford manuscript. Wrote Justice Brennan: "In my judgment, the Court's fair use analysis has fallen to the temptation to find copyright violation based on a minimal use of literary form in order to provide compensation for the appropriation of information from a work of history."<sup>44</sup>

## NEWS, IMAGES, AND FAIR USE

Since *Harper & Row* many other cases have concerned news and fair use, and particularly the use of video or still images, either *from* the news or *in* the news. One fair-use battleground is fueled by the use of externally produced video by television news programs. Hungry for dramatic video, and always running on deadline, TV stations may copy and broadcast newsworthy videotape produced by an external news service or by a home video buff without stopping to get copyright clearance. Is this a fair use?

A sample case is *Los Angeles News Service v. KCAL-TV*.<sup>45</sup> In April 1992 rioting broke out in Los Angeles following a controversial court verdict. The independent news service LANS hovered above an intersection in its helicopter and captured dramatic video scenes of a motorist named Reginald Denny being beaten in the street. One of the LANS subscriber stations aired the video live, and LANS provided tape to a few other subscriber stations. KCAL was not one of those subscriber stations. When it asked LANS for a license to broadcast the Denny tape that day, LANS declined. So KCAL obtained a copy of the tape from another station and broadcast it several times on its news programs. LANS sued for copyright infringement.

The federal trial court said KCAL was protected by the fair use doctrine, based on the fact that the tape was highly newsworthy. But the court of appeals reversed. It held that even though KCAL was using the tape for a news purpose, it was also attempting to profit by exploiting the LANS coverage and—to make matters worse—presenting the tape as if it were its own. Furthermore, the court said, even though LANS could show little harm to its market based solely on the unauthorized KCAL use, the proper question was whether LANS would be adversely affected if this same practice were adopted by other stations. The court concluded that it surely would. Therefore, it was not fair use.

One of the most intriguing copyright cases of 2009 raised additional questions about the use of news images in still-photo form. Artist Shepard Fairey created a poster titled *HOPE*, featuring an image of Barack Obama, that was seen by millions during the Obama presidential campaign. The graphic Obama portrait was created, however, directly from an Associated Press photo of Obama, without

AP consent. The AP informally accused Fairey of copyright infringement. Fairey responded by filing a lawsuit, seeking a declaratory judgment that his use of the photo transformed the image for an entirely different purpose and that he was therefore protected by the fair use doctrine.

The AP then filed a formal counterclaim for infringement, asserting that Fairey engaged in blatant copying of the photo and that his derivative work therefore was not a transformative, socially productive use but rather simple copyright violation. Though the parties in the case have focused on fair use, or the lack thereof, copyright experts have raised another interesting question: the extent to which a candid, unposed, routine news photo is protected in the first place. Obama's face by itself is factual content and not protected by copyright, of course. Assuming that a photojournalist, using a motorized camera drive, took dozens of photos barely distinguishable from one another, and that other photojournalists standing shoulder to shoulder were snapping the very same moment in time, is there a particular manner of expression that warrants copyright protection for any one of those shots? The clear weight of prior court decisions is, yes. But if the expressive component is deemed slim, the zone of fair use could be deemed broader. The case was pending as this book went to press.<sup>46</sup>

Another recent case illustrates a common practice in newspapers and magazines: using school-years portraits to help illustrate a feature story. The plaintiff owned a photo studio that specialized in high-school senior portraits, and in 1996 the studio photographed a student named Colleen Shannon, producing for her a package of prints. Portrait photographers typically retain the copyrights in their work. But several years later, without plaintiff's consent, one of the portrait shots ran in the fiftieth anniversary edition of *Playboy* magazine. It appeared among other growing-up photos of Shannon on a biography page titled the "Playmate data sheet." In the case against *Playboy* and Shannon for copyright infringement, the district court in 2008 held the publication was a fair use. Even though the use was commercial, the court said the photo's appearance on the bio page was relatively incidental and transformative and that it would have no negative effect on the plaintiff's entirely separate market for portrait prints.<sup>47</sup> Note that the result could have been different had the photo been used more prominently or had the plaintiff been in the business of selling photos to publications.

## PARODY AND CRITICISM

Works of parody—those that mimic and poke fun at other authors' works—have long been recognized by the courts as a form of social criticism as well as entertainment and thus deserving of some fair-use protection against copyright infringement claims. In determining whether parodic works are fair uses, the analysis often focuses on the third factor, the substantiality of copying. The general rule is that this factor will weigh in favor of fair use so long as the parodist appropriates no greater amount of the original work than is reasonably necessary to recall or conjure up the object of the parody.

For example, in 1989 the rap group 2 Live Crew sought permission to record a parody of “Oh, Pretty Woman,” a 1964 hit song. Acuff-Rose Music, which owned the copyright, refused to grant a license. 2 Live Crew nevertheless released its own, more shocking version. Acuff-Rose sued, claiming that the parody was in bad taste and would disparage the future value of its copyright. In *Campbell v. Acuff-Rose Music, Inc.*, a unanimous 1994 decision, the Supreme Court held that 2 Live Crew’s parody could qualify as a fair use. The Supreme Court noted that while one purpose of 2 Live Crew’s song clearly was commercial, another apparent purpose was to comment on, or parody, the original song. Therefore, the key factual question was whether 2 Live Crew used too much of the original song: “Parody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. . . . When parody takes aim at a particular original work, the parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.”<sup>48</sup> The Court noted that 2 Live Crew copied the characteristic opening bass riff of the original tune and that the first line of words copied the original lyrics. But the Court remanded the case to the trial court to determine whether the amount taken was excessive. Eventually the parties settled out of court.

The judicial inquiry is similar when copyrighted works are used in other, more direct forms of social criticism. Another 2008 case will illustrate: Premise Media Corp. produced a film titled “Expelled: No Intelligence Allowed,” which argued that the “intelligent design” theory of life’s origin should get a more receptive look by the academic and scientific communities. The film consisted mainly of interviews but also included historical video footage and music. The music included fifteen seconds from “Imagine” by John Lennon and on-screen the lyrics, “Nothing to kill or die for, and no religion too.” The excerpt, used without consent, appeared in a portion of the film that looks critically at people who are critical of religion.

The widow and children of Lennon, owners of the “Imagine” copyright, sued for infringement, seeking an injunction against further distribution of the film with the song included. But the district court denied the injunction on the ground of fair use. The defendants did not include the excerpt merely to exploit the original, the court said. Rather, the use was transformative, for purposes of criticism and commentary: “to criticize what the filmmakers see as the naivete of John Lennon’s views.” Further, the portion of “Imagine” used was reasonable and the use in no way usurped the market for the original work.<sup>49</sup>

## COPYRIGHT IN CYBERSPACE

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For creators and owners of copyright-protected material, the Internet has been a mixed blessing. On the one hand, digital technology and the exponential growth of the Internet have given copyright holders a fast and inexpensive way to disseminate material to a worldwide audience of online customers. But on the

other hand, Internet availability provides a tantalizing avenue for unauthorized copying and manipulation of the protected work. Though other technologies, such as photocopy machines and video recorders, have proved convenient tools for copyright infringement, the Internet presents a copyright infringement threat of vastly greater scope.

The fact is that copyright infringement via the Internet is rampant. With the aid of commercial websites, consumers routinely pirate music for their personal collections. Website designers find their work stolen by other sites. Photos in books and magazines are scanned, manipulated, and exploited for commercial sites and presentations. Computer game creators find their software illicitly copied and distributed via the Internet to tens of thousands of users. Even the work of professional poets is purloined with a few mouse clicks and sent all over the Internet world, where tracing the chain of wrongdoing becomes virtually impossible.

Copyright law must provide adequate protection to authors if the Internet is to reach its full potential as a medium for society's most serious and creative work. As one legal scholar explained the problem: "If all kinds of works of authorship, particularly those of intense creativity and imagination, are to embark willingly on the cyber-road, then authors require some assurance that the journey will not turn into a hijacking."<sup>50</sup>

On the other hand, the culture of the Internet is one of free access, sharing, and informality, where the conventions of property rights meet significant resistance. A study by the Pew Research Institute in 2000 found that 78 percent of Internet users who downloaded music without paying didn't think it was stealing. And 61 percent of those music downloaders said they didn't care if the music they capture is protected by copyright.<sup>51</sup>

## EXCLUSIVE RIGHTS IN A DIGITAL WORLD

Despite the fair-game attitude of many Internet users, the legal fact is that a copyright owner's exclusive rights do apply in cyberspace. For several years, it was unclear precisely when those rights to distribute, reproduce, adapt, perform, and publicly display were triggered in the new, electronic terrain. Did the mere transmission of material over the Internet constitute a public "distribution" of the work? Did Internet availability constitute public "display"? When material was uploaded to or downloaded did this act by itself constitute a "reproduction" of the work? If a website creator included a hypertext link to another site without consent, did this amount to an unauthorized "display" of the other site?

Today the answers to most of these questions are well established. For instance, most digital access to material—including uploading from a computer server or entering work into a computer's memory from a CD—constitutes copying.

One of the first cases to directly address these exclusive rights questions as they pertain to Internet service providers was *Playboy Enterprises v. Frena* in 1993. The defendant, George Frena, operated an electronic bulletin board service called Techs Warehouse BBS. For a fee, subscribers could log onto the service, browse through files of photographs, and download copies. The problem, however, was that 170 of the photos found available on Frena's service were taken, without consent, from copyrighted magazines of Playboy Enterprises. *Playboy* sued for infringement, and, because Frena admitted the photos were displayed on his service, *Playboy* moved for summary judgment.

In his defense, Frena argued that he never uploaded *Playboy's* photos onto his service; rather a subscriber had uploaded the photos, at which time they became immediately available to other subscribers. Assuming this is true, did Frena actually violate any of the exclusive rights guaranteed to copyright owners when he simply allowed the photos to remain in the system? The federal district court said yes.

First, the court held that Frena usurped *Playboy's* exclusive right of public distribution: "There is no dispute that Defendant Frena supplied a product containing unauthorized copies of a copyrighted work," the court wrote. "It does not matter that Defendant Frena claims he did not make the copies."<sup>52</sup> Furthermore, the court held that Frena infringed upon *Playboy's* public display rights. The court noted that under the Copyright Act the concept of "display" is a broad one that covers the showing of an image on any viewing apparatus, electronic or otherwise, and connected with any sort of information storage and retrieval system. Also, the display was "public" because it was available for viewing by a substantial number of persons, in this case subscribers.

The Frena case remains instructive on how the Internet may infringe upon a copyright holder's exclusive rights. However, the question of when an Internet service provider (ISP) can be held liable for that infringement is in many cases now governed by federal statute.

## DMCA IMMUNITY

In 1998 Congress enacted the Digital Millennium Copyright Act (DMCA), a package of legislation that implemented international treaty provisions and made some high-tech-era adjustments to U.S. copyright law. One pivotal DMCA provision, section 512, gives ISPs immunity from copyright infringement liability for material posted by others. Referred to in its own right as the Online Copyright Infringement Liability Limitation Act,<sup>53</sup> or more informally as the "section 512 safe harbor," the statute states that an ISP, including libraries and educational institutions, shall not be liable for storing or transmitting infringing material posted by others on the ISP's site. This immunity applies so long as the transmission or storage is an automatic, technical process and the ISP did not specifically select the work for display—in other words, as long as the ISP is "passive." And once



the ISP learns of the infringement, it must “expeditiously” remove the infringing material.

In order to qualify for this safe harbor, service providers must in addition maintain an effective system by which copyright owners can notify the ISP of an alleged infringement and a process to promptly investigate such allegations and remove the unauthorized material, if appropriate. This is called a “notice-and-takedown” process.

It is no exaggeration to say that the section 512 safe harbor has played a crucial role in the development of today’s mega-websites of user-generated content, from YouTube to Facebook to Wikipedia. The relative legal certainty provided by this immunity helped encourage participatory Internet services to invest and grow aggressively, and in roughly a decade allowed them to become dominant channels in a new culture of communication. (Recall from Chapter 4 that another statutory immunity, “section 230 immunity” from defamation, has also played an important role.)

Paradoxically, as these new websites grew to a size few could have envisioned, with millions of new postings daily, the notice-and-takedown scheme has become a huge administrative burden and has itself generated lawsuits. Copyright owners are generating reams of section 512 takedown notices; flooded service providers are in some cases removing material without evaluating whether it is truly infringing; and angry users are sending counter-notifications that their postings are legal and demanding that their material be placed back online, or simply posting it again themselves. All sides are growing frustrated.

In a case with huge legal and business-model implications for user-generated-content sites, media giant Viacom and its affiliate film and TV production companies in 2007 filed a copyright infringement lawsuit against YouTube, seeking \$1 *billion* in actual damages and defendant’s ill-gained profits. YouTube answered that it is protected by the section 512, DMCA immunity. But Viacom’s complaint, filed in federal court in New York, essentially argues that the required notice-and-takedown system is a farce:

YouTube’s website purports to be a forum for users to share their own original “user generated” video content. In reality, however, a vast amount of that content consists of infringing copies of Plaintiffs’ copyrighted works. . . . In fact, Plaintiffs have identified more than 150,000 unauthorized clips of their copyrighted programming on YouTube that had been viewed an astounding 1.5 billion times. . . .

[YouTube] has decided to shift the burden entirely onto copyright owners to monitor the YouTube site on a daily or hourly basis to detect infringing videos and send notices to YouTube demanding that it “take down” the infringing works. In the meantime, YouTube profits handsomely from the presence of the infringing works on its site.

YouTube's strategy also leaves Plaintiffs unable to meaningfully protect their rights in time-sensitive works, such as episodes of "The Daily Show" or "The Colbert Report". . . .<sup>54</sup>

The case, *Viacom International v. YouTube*, entered a lengthy and complicated discovery stage. As this book went to press the high-stakes case was pending in the trial court.

## PEER-TO-PEER PIRACY

Perhaps the most contentious copyright battle of the new millennium has been "peer-to-peer" digital file sharing and the rampant infringement of music and video copyrights. In the late 1980s, a file format known as MP3 was developed for the digital storage of audio recordings, and it permitted rapid transmission of files from one computer to another. An Internet company called Napster facilitated that transmission among its users with a peer-to-peer file-sharing scheme. Napster provided the software for users to search the MP3 files on other users' computers and then download exact copies of music, for free. In 2001 some 60 million people were participating in what amounted to a big, international, music swap meet. The music industry claimed the free downloads were costing it billions of dollars in lost revenue annually.

### *The Napster Case*

Eighteen record companies sued Napster for contributory infringement. They claimed that Napster users were blatantly infringing copyrights by digitally reproducing and distributing music without a license. And Napster should be liable, the plaintiffs said, because it knowingly encouraged and assisted this illegal activity by its users.

In *A&M Records, Inc. v. Napster, Inc.*<sup>55</sup> the Court of Appeals for the Ninth Circuit in 2001 sided with the plaintiffs and upheld a preliminary injunction against Napster. The court first noted that in the vast majority of instances users were indeed infringing on copyrights and were not engaged in fair use. Users were downloading music for personal entertainment, not a socially productive purpose, and the free downloading had a harmful effect on the music owners' potential market.

The key question remaining, then, was whether Napster itself was a contributory infringer. The court of appeals, noting that Napster controlled a system used predominantly for infringement, said the finding at trial likely would be yes. Following the decision, Napster promptly ceased its music-swapping operation. And the music industry began to meet consumers' demands for music over the Internet by setting up subscription-type services. But other rogue music-swapping sites—so-called sons of Napster—took hold.

Along came the next generation of peer-to-peer software. Two companies, Grokster and StreamCast Networks, distributed free software that allowed users to share digital files through peer-to-peer networks in which personal computers communicated directly with each other—not through a central server. The end result was the same: rampant, unauthorized downloading of copyrighted music and, increasingly, video. But technically, the software distributors were not in the infringement loop. Unlike Napster, they did not use a central server to route or track user downloads. Would this technical distinction insulate Grokster and StreamCast from contributory infringement?

### **MGM v. Grokster**

MGM Studios and several other film studios, recording companies, songwriters, and music publishers sued Grokster and StreamCast for their users' infringements, alleging that the defendants fully intended consumers to use their software illegally. The lower federal courts sided with the defendants, noting that, because of the decentralized design of software, Grokster and StreamCast had no actual knowledge of their users' acts of infringement.

But the Supreme Court granted review, and the case appeared destined for monumental significance. On one side were technology companies, warning that if Grokster and StreamCast were found liable for their users' unknown infringements, then any company would be dissuaded from technical innovation that might happen to be used, by some consumers, in infringing ways. On the other side were the creators and owners of copyrighted content, protesting that a green light for Grokster and StreamCast, coupled with the impracticality of suing individual consumer infringers, would lead to a complete mockery of copyright protection. The broad legal question, as stated by the Court, was under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for copyright infringements by other persons using the product.

The Court issued its unanimous decision in *MGM Studios v. Grokster*<sup>56</sup> on the last day of its 2005 term, holding that Grokster and StreamCast could indeed be liable for their users' infringing acts. The Court began by noting the significance of the problem. More than 100 million copies of the software in question were distributed to consumers, and billions of files were shared—every month—across the networks. While some of the shared files admittedly were not protected by copyright, most were, and evidence suggested the vast majority of users' downloads were illegal. The probable scope of infringement, the Court said, “is staggering.”

The Court then distinguished the case from *Sony v. Universal Studios*, decided two decades earlier. The VCR manufacturer was not secondarily liable for infringement because evidence showed the main use of the VCR was “time-shifting” TV programs, a fair use, and because there was no evidence that Sony intended to prompt illegal taping. In contrast, the predominant use of the

Grokster and StreamCast software was infringing, and the two companies were not mere bystanders. They clearly intended for their software to be used to obtain copyrighted works, and StreamCast, for instance, advertised itself as a way to “get around” having to pay for music.

The legal precedent of *MGM v. Grokster* is significant: One who distributes and promotes a product with the clear intent of fostering copyright infringement is liable for the resulting acts of infringement by others. Some legal experts call this the “inducement theory” of contributory infringement, in which the intent of the technology provider is key. Regardless of exactly how a technology works or whether it also has noninfringing uses, a clearly illegal objective, it appears, will not be overlooked by the Court.

### **Consumer Cases**

Even with the *Grokster* ruling and the emergence of legal, online music-purchasing alternatives, infringing file-sharing continued. This left the music industry, and increasingly the film industry, with a tough decision: whether to undergo the expense and the inevitable negative publicity of suing individual infringers. Believing it had no real choice, the music industry filed thousands of cases against individuals engaged in peer-to-peer infringement. In the typical scenario, the infringement is clear, and defendants quietly accept settlement offers for a few thousand dollars.

The danger of not agreeing to a settlement was made evident in one well-publicized case that did go to trial, against Minnesota resident Jammie Thomas-Rasset. Capitol Records and other record labels filed the infringement case based on evidence that Thomas-Rasset had downloaded or distributed about 1,700 copyrighted recordings using the Kazaa peer-to-peer system. In 2007 a jury found in favor of the plaintiff record companies and awarded \$222,000 in damages. But the judge ordered a new trial after concluding that improper jury instructions had been given. In 2009 a different jury also found in favor of the plaintiffs. The jury concluded that Thomas-Rasset willfully violated copyrights on 24 songs and, applying a statutory-damages rate of \$80,000 per song, awarded plaintiffs \$1.92 million. Further proceedings were likely in the case.<sup>57</sup>

## **TRADEMARKS**

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Another important form of intellectual property is the trademark. The marketplace brims with trademarks in ads, on packaging, on the sides of vehicles, in letterheads, as lapel buttons, on bumper stickers, on magazine and matchbook covers. In every commercial medium, trademarks compete for our attention. In essence, they are the beacons of capitalism. A **trademark** is any word, name, slogan, design, or symbol that is used in commerce to identify a particular product and distinguish it from others.

Akin to trademarks, and possessing the same basic legal protections, are service marks and trade names. A **service mark** is to services what a trademark is to products: It distinguishes the services of one company from another. A **trade name** is used to identify and distinguish the company itself. A single name, such as *Sears*, may serve as all three, identifying products, services, and the business itself. In this chapter the words *mark* or *trademark* are used to refer generally to all three forms of protected identification.

The main purpose of trademark protection is to increase the reliability of marketplace identification and thereby help consumers select goods and services. A distinctive trademark quickly identifies the origin of a product, and over time the mark may be equated with a particular level of quality. Thus trademarks may drastically reduce the time and costs that consumers would otherwise incur in searching for, verifying, and individually testing items in the marketplace. In short, trademark laws are intended to reduce consumer confusion. Secondly, trademark protection also helps to ensure fair economic returns for companies that invest in a consistent level of quality. In such cases the trademark itself becomes a valuable asset, a symbol of the earned goodwill of a business. Examples of protected marks are the words in italic type:

*Yahoo!* online computer services  
*Levi's* jeans  
*Jet Ski* personal watercraft  
*Band-Aid* adhesive bandages  
*Frisbee* flying discs  
*Academy Awards* annual award program  
*Jaws of Life* rescue tools  
*Business Week* magazines  
*Jacuzzi* therapeutic whirlpool baths  
*Victoria's Secret* women's lingerie

Other protected marks are the logos of McDonald's golden arches, the eye of CBS, the shell insignia of Shell Oil, and the slogans "Just do it!" "Got milk?" and "This Bud's for you."

Knowing basic trademark principles is important for several reasons. First, as a matter of accuracy, professional communicators should be able to recognize trademarks so they can use them properly—as capitalized, proper adjectives (or proper nouns, in the case of trade names). Second, many communicators, particularly in advertising and public relations, are entrusted with the task of creating and policing trademarks on behalf of employers and clients. And third, the mass media themselves often have trademarks to protect. The titles of newspapers, magazines, websites, newsletters, TV programs, or a series of books can be trademarks, for example.

Like copyrights, trademarks are protected as a form of property. Owners of valid trademarks are granted exclusive rights to their use in commerce. Whereas copyrights are governed exclusively by federal statute, however, trademarks are governed both by federal and state law. The applicable federal law is the Trademark Act of 1946, also known as the Lanham Act.<sup>58</sup> The act is primarily a national registration scheme, reserved for marks used in interstate or foreign commerce. Day-to-day administration is handled by the U.S. Patent and Trademark Office. Federal authority to govern trademarks rests on the commerce clause of the U.S. Constitution, contained in Article 1, Section 8.

At the state level, trademark rights are governed by a mixture of statutes and common law. Generally it is statutes that set up state registration systems and specify the details of trademark ownership, transfer, and enforcement. Considerable uniformity exists among these state statutes. In 1949 the U.S. Trademark Association (now the International Trademark Association) prepared the Model State Trademark Bill. The model bill, most recently revised in 2007, has been adopted in some form as the basic trademark law in nearly all the states.

## CREATION OF TRADEMARKS

As with copyrights, legal rights to trademarks arise automatically, apart from any particular governmental formalities. Unlike copyrights, however, the inception of trademark rights is not at the moment a word or symbol is first created or scribbled on paper. Rather, trademark rights stem from the actual use of a distinctive mark in commerce.

### *Use in Commerce*

There is no bright-line standard for the amount of use required to establish trademark rights. But the mark must be used in connection with the public distribution of goods or services; only then are legal rights to a trademark secured.

This principle flows from the general purpose of trademark protection. After all, the law's intent is not to encourage the creation of trademarks per se, but to give a reasonable degree of competitive integrity to those marks actually in use. Not only is public use the key to trademark creation, but rights also come to an end automatically when the mark is abandoned. Protection remains in effect as long as the mark is actively and continuously used by its owner.

In judging whether use of a mark has been sufficient for trademark rights, courts will consider whether the mark has actually been placed before a significant segment of the public, whether there has been a sincere effort to market the product or service commercially, and whether the mark was used in trade with actual customers. There is no legally sanctioned way to reserve a trademark idea for future use.

### ***Distinctiveness***

In addition to use in commerce, distinctiveness is required for a valid mark. This requirement, too, is central to the whole notion of a trademark—that the trademark user's goods be distinguished in the marketplace. And as a general rule, the more distinctive a mark, the greater its potential scope of protection. The hierarchy of distinctiveness is as follows:

- Fanciful marks. The most distinctive. Words that by themselves give no clue to the product. Frequently made-up terms. Examples are *Exxon* and *Kodak*.
- Arbitrary marks. These are existing, common words applied in a unique, seemingly arbitrary way. Examples include *Ivory* soap, *Camel* cigarettes, *Apple* computers.
- Suggestive marks. These are terms that provide some clue to the product or service but not a vivid description. Examples are *Playboy* magazine and *Orange Crush* orange-flavored drink.
- Descriptive terms. Words that explicitly describe characteristics of the product. Depending on usage, may or may not be sufficiently distinctive for protection. An example might be *Surfing News*, for a newsletter about surfing.
- Generic terms. Common terms already in use to describe a kind of product or service. For example, the terms *cat food*, *bicycle* or *surfboard wax* cannot be taken from common usage and claimed as trademarks.

In most cases, adjectives that merely describe a characteristic of the product—such as *big*, *red*, or *fast*—are also insufficiently distinctive to become trademarks. In 1977, for example, the federal court of appeals ruled that the term *light* was a generic or descriptive word when applied to low-calorie beer. Therefore, neither the word nor its phonetic equivalent, *lite*, may be appropriated as a trademark for beer. The court used the analogy of white bread; no one bakery could claim exclusive use of the word *white* in reference to its product.<sup>59</sup>

Yet some descriptive terms can attain trademark status if, over time, they acquire a **secondary meaning**. Though the words initially are just descriptive, secondary meaning arises when consumers learn to associate the term with one particular producer or source. For example, a court in 1985 held that the service mark SEATS, for a computerized ticket reservation business, had through use acquired a secondary meaning in the context of reservation services and thus became a protected trademark. Similarly, ordinary shapes, such as circles or hearts, cannot achieve trademark status unless a secondary meaning has been established.

Because a mark must also be distinctive in relation to other merchants' marks, trademark ownership can vest only in the first user of a particular mark. Other merchants who later use the same mark, or one confusingly similar, will not have met the distinctiveness test and may themselves be infringers. As a general rule, though, the distinctiveness test is limited to the user's particular geographical market. Often

the first user has employed the identifying mark only within a limited territory of the United States. If so, other merchants who use a similar mark in entirely separate localities are also entitled to trademark protection in their separate market. However, the territorial allowance has been limited to cases in which the subsequent merchants independently adopted the mark in good faith—that is, without trying to copy the mark or capitalize on its good reputation. Also, federal registration has the legal effect of precluding a good faith adoption by someone else anywhere in the United States because registration serves as notice to all other businesses.

To avoid an embarrassing and costly conflict with an existing mark, creators of a proposed trademark should always conduct or commission a trademark availability search. These searches are performed by law firms or companies that specialize in trademark searches. A computer database check is used to find similar words or designs among the trademarks officially registered with the federal or state governments. If the proposed mark appears to be available after this initial check, a more time-consuming search of specialized business directories and other publications may be conducted to determine whether some unregistered mark could pose a conflict. For those wishing to conduct an initial trademark search themselves, some governments, including the United States, now maintain free trademark database search sites on the Internet.

## TRADEMARK REGISTRATION

Legal rights to trademarks arise automatically through use, and those rights can continue to exist independently of registration. A number of valuable advantages flow from government registration, however, so it is advisable to register at both the state and federal levels.

### ***Federal Registration***

Under the federal Lanham Act, trademarks used in interstate or foreign commerce may be registered in the U.S. Patent and Trademark Office. The primary benefits of federal registration are these: First, it serves to create a legal presumption that the trademark is valid. This means that in a lawsuit for infringement, the burden of proof shifts to the defendant to show why the registered mark is undeserving of protection. Second, registration serves as nationwide notice of the registrant's claim of ownership. Therefore, a second user of the mark, in some other area of the country, cannot claim territorial ownership rights. Third, with federal registration comes the right to file infringement lawsuits in the federal courts. A fourth benefit is that registration simply serves as a deterrent against use by others.

Federally registered marks may be accompanied by the ® symbol as a warning to others. (Owners of unregistered marks may use the notice symbol ™; the ® designation may be used only upon federal registration. See Exhibit 8.4.)



EXHIBIT 8.4 *Trademark Marking*

These symbols or text may be used to identify a trademark:

TM	Used on goods to signify a claimed trademark.
SM	Used in conjunction with services to signify a claimed service mark.
®	May be used only on marks that have been federally registered.
Reg. U.S. Pat. & Tm. Off.	May be used only on marks that have been federally registered. Sometimes printed some distance from the mark and referred to with an asterisk.

Federal registration lasts for ten years, provided that the mark continues to be used in interstate commerce. The registration is renewable indefinitely, as long as the mark continues to meet the “use it or lose it” requirement.

**State Registration**

Each state also offers a trademark registration scheme, usually through the secretary of state’s office. The benefits of state registration are not as extensive as those of federal registration, however, so interstate merchants with federal registration often don’t bother to obtain registration in individual states. Still, state registration is important for local businesses that do not qualify for federal protection.

State statutes typically specify that registration creates a legal presumption of valid ownership, and owners of state-registered trademarks may be entitled to enhanced damage awards for infringement. State registration is generally obtained more quickly than federal registration—often within a few months of filing an application. As with federal registration, state registrations are usually renewable for successive five- or ten-year periods, as long as the mark remains in use.

**INFRINGEMENT**

The primary method of protecting a trademark against use by others is to file a lawsuit for infringement. The plaintiff may sue for money damages or an injunction against further use, or both. The main legal inquiry in infringement lawsuits is whether the allegedly infringing mark is similar enough to create a likelihood of confusion in the marketplace. Note that trademark law does not prevent others from mentioning the trademark in the media, criticizing the brand, or even

engaging in comparative advertising. In the typical infringement scenario, another business creates a similar mark, either innocently or by design, and uses it on products or services in a manner that would confuse consumers about the origin of those products.

For example, *Playboy* magazine sued in federal court to enjoin another publisher from using the name *Playmen* as the title of its male-oriented magazine. The federal Court of Appeals agreed that *Playboy* was entitled to the injunction because survey evidence suggested that product and source confusion would result from the similarities between the titles. Also, the court said the defendant's obvious purpose in adopting *Playmen* was to capitalize on the *Playboy* mark—another factor that may be considered when judging trademark infringement.<sup>60</sup>

Another magazine case involved Petersen Publishing, which has published *Teen* magazine since 1957, and Time, Inc., which has published *People* magazine since 1974. In 1997 each publisher was working independently on a new magazine, and each wanted to name its new magazine *Teen People*. When each learned of the other's plans, each was, of course, unhappy and ran down to the courthouse. *Teen* apparently abandoned its plan for naming the magazine, but when *Time* wanted to move ahead with its plan, *Teen* sought an injunction. Based in part on the appearance of *Time*'s stipulated logo for the new publication, a jury concluded that its new publication would not create a likelihood of confusion, and in 1999 the Court of Appeals affirmed.<sup>61</sup>

Generally speaking, infringement occurs only when similar or identical marks are used to identify similar or related kinds of products or services. That is to say, the infringer usually must be engaged in a competing type of business.

But sometimes trademark protection extends beyond the trademark holder's particular categories of products. Especially when the mark in question is highly distinctive and broadly known, such as *Exxon* and *Kodak*, attempts to capitalize on the mark may constitute infringement even when the upstart's products are very different from those produced under the original mark. The more distinctive and famous the mark, the more likely it is that consumers may think that even a different kind of product, if it bears that same name, must be from the same source.

## DILUTION

A lawsuit for infringement is not the only way in which trademark owners may protect the value of their marks. Most states have passed antidilution statutes, under which the trademark owner may seek an injunction to prevent dilution of a distinctive mark—even in the absence of public confusion or business competition between the parties. Federal law also provides such protection, under the Federal Trademark Dilution Act of 1995 and a revision of the act in 2006.<sup>62</sup>

**Dilution** may be defined as an activity that threatens to blur the distinctive quality of a well-known mark or tarnish the mark's reputation. To succeed on a

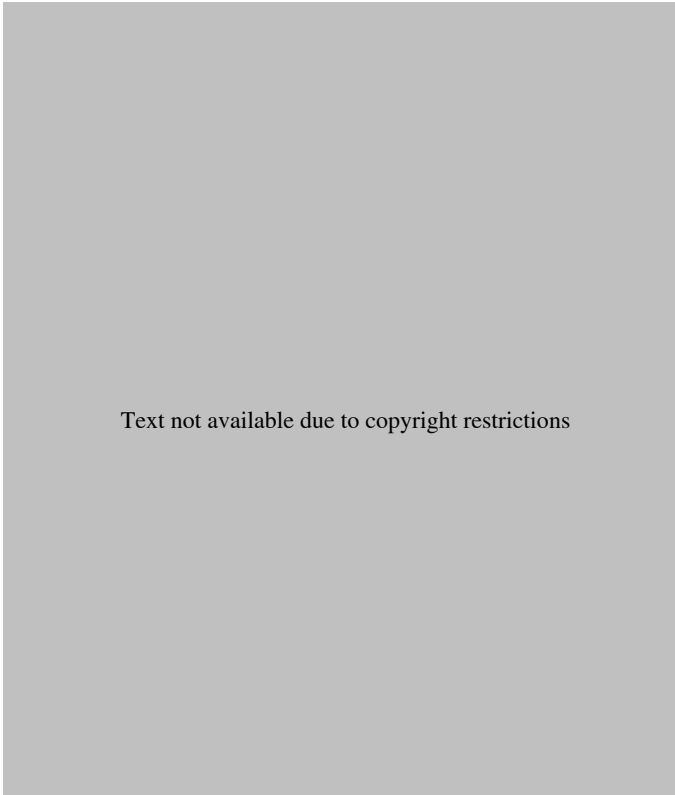
dilution claim, the plaintiff needs to prove just two basic elements: (1) that the plaintiff's mark is indeed well known and distinctive, and (2) that the defendant's actions have raised a likelihood of dilution. But here again, a dilution claim cannot be used to prevent others from merely commenting on, criticizing, or parodying the well-known mark—or even using it in comparative advertising.

An example of dilution through tarnishment is the 1994 case of *Anheuser-Busch, Inc. v. Balducci Publications*. A humor magazine, *Snicker*, published on its back cover a mock advertisement for the fictitious product “Michelob Oily.” The full-page ad depicted a replica of a can of Michelob beer pouring oil onto a fish, an oil-soaked rendition of the Anheuser-Busch eagle logo, and various “Michelob Oily” bottles and labels that closely resembled the brewery's actual products. The mock ad stated in bold type “ONE TASTE AND YOU’LL DRINK IT OILY.” Actual Anheuser-Busch clip art was used to replicate the protected trademarks. The magazine publisher defended the mock ad as a parody intended to comment on a recent oil spill in the Gasconade River, a source of Anheuser-Busch's water supply.

Anheuser-Busch sued the magazine on several grounds, including trademark dilution under Missouri law. The trial court noted the magazine's substantial First Amendment right to engage in social commentary, and it dismissed the trademark dilution claim because, it said, there was no threat of tarnishing the plaintiff's trademark; the mark was not being used in association with other, shoddy products. But the federal Court of Appeals reversed. The appellate court held that the First Amendment did not necessarily protect against a dilution claim simply because the trademark is used in an editorial or artistic context. The First Amendment did not shield a parody that utilized protected trademarks to a degree greater than necessary to convey the point of the parody. Furthermore, a survey indicated that many people construed the ad parody as suggesting that Michelob beer actually contained some oil, thereby tarnishing the trademark's carefully developed reputation. Therefore, the ad parody was held to violate the anti-dilution statute, entitling Anheuser-Busch to an injunction prohibiting further distribution.<sup>63</sup>

For some trademark owners, the most sinister problem is the improper use of the trademark in the everyday speech of the general public. A trademark is properly used as an adjective (Xerox copiers), not as a noun (“Where's the Xerox?”) or verb (“Please Xerox this”). When such improper uses of the trademark become so commonplace as to overshadow the distinctive meaning of the mark, the mark may be deemed by courts to have become a **generic term**, no longer protectable as a trademark. This fate has befallen such former trademarks as *escalator*, *margarine* and *yo-yo*, for example. Some companies regularly buy advertising to remind communications professionals and consumers of the proper use of certain trademarks (Exhibit 8.5).

Recall that in the chapter Hypothetical, you were concerned about protecting the new “2XS” mark for an energy drink. If the mark had not already been fully researched and registered federally, it would be wise to do that before embarking on a national campaign.



Text not available due to copyright restrictions

## TRADEMARKS AND DOMAIN NAMES

The close relationship between trademark rights and Internet domain names has caused significant legal hassles. Domain names are the Internet site addresses used by individuals and organizations. For example, if Jane Doe works at XYZ Corporation, she might have an e-mail address, `jdoe@xyz.org`. The `xyz.org` portion is the domain name, and this protocol or format applies to both e-mail and web addresses, also called universal resource locators or URLs. The `.org` portion is referred to as the top-level domain name, or TLD.

For most of the 1990s, an organization called Network Solutions, Inc. (NSI) was exclusively responsible for registering commercial domain names in the United States. Operating under a special agreement with the federal government, NSI assigned domain names on a first-come, first-served basis. It charged a \$100 fee to assign the requested name for a two-year period, and then a renewal fee thereafter. NSI would not assign a domain name that was currently registered by someone else. The names were initially assigned under five generic TLDs: *.com*, *.net*, *.edu*, *.org*, and *.gov*.

Today there are hundreds of competing domain name registrars worldwide, handling the increasingly burdensome task of processing tens of thousands of domain name requests annually. And additional TLDs have been established, such as *.info*, *.biz*, and *.pro*. The new commercial registrars are accredited by the Internet Corporation for Assigned Names and Numbers (ICANN), which has also designed an arbitration process to resolve domain name disputes. The arbitration service is operated by WIPO, the World Intellectual Property Organization.

In many cases, however, as the Internet has blossomed and the commercial stakes have risen, disputes have gone to the courts. A source of considerable legal frustration has been that the domain name registration process does not include a trademark search prior to assigning a requested domain name. Trademark owners therefore have frequently found that other businesses have been assigned domain names confusingly similar to their existing trademarks. In some cases this confusion has been intentional, as individuals called cybersquatters or cyberpirates have rushed to register domain names containing others' trademarks. They may have no intention of utilizing the domain names themselves, but rather hope to extract payment from the trademark owners at a later date, when the trademark owners seek to use the domain names for websites. In other cases, cyberpirates may actually use the names to attract more traffic to their own sites, sometimes by intentionally misleading the public. In a variation of this practice, called "typosquatting," profiteers register domain names to scoop up consumers who accidentally miss-type the name of the business they are seeking.

Lawsuits for trademark infringement have been a frequent result of this activity. For example, Planned Parenthood Federation of America owns a registered service mark in its name and operates a website for sexual health, contraception, family planning, and abortion information at the domain name *ppfa.org*. In 1996 Richard Bucci, an active opponent of abortion, registered with NSI the domain name *plannedparenthood.com* and set up a website at that address, where he provided links to anti-abortion literature. Claiming a likelihood of confusion with its service mark, Planned Parenthood sought a preliminary injunction under the federal Lanham Act to prevent Bucci's use of the domain name. Following a lengthy analysis, a federal District Court concluded that consumer confusion was indeed likely and enjoined Bucci from using the name Planned Parenthood to identify any Internet site—despite his valid registration.<sup>64</sup>

In an effort to give trademark owners more options for protecting their marks in cyberspace, Congress in 1999 enacted the Anticybersquatting Consumer Protection Act (ACPA). It created a new form of civil action that may be filed against persons who, in “bad faith,” register domain names identical to or confusingly similar to an existing, distinctive trademark. An intent to capitalize financially on the goodwill of the trademark owner or to harm the goodwill of the trademark owner is considered bad faith. Under the ACPA, a trademark owner may be awarded statutory damages of up to \$100,000, as well as cancellation or reassignment of the disputed domain name.<sup>65</sup>

An illustrative case in this area is *Victoria's Secret Stores v. Artco Equipment Co.*<sup>66</sup> Victoria's Secret Stores had for twenty years been the record owner of the Victoria's Secret trademark, and it operated a website, [victoriasscret.com](http://victoriasscret.com), from which it sold women's clothing and accessories. The plaintiff alleged that defendant Artco, in an effort to divert consumers for its own commercial gain, registered the domain name [victoriasscrets.net](http://victoriasscrets.net) and linked it to its own existing websites, including [houseoflovetoy.com](http://houseoflovetoy.com), where it sold lingerie and adult products. The parties first went through ICANN's dispute resolution process, where the arbitration panel transferred ownership of the disputed domain name to Victoria's Secret. But Victoria's Secret then sued in federal court to obtain damages stemming from Artco's use of the mark. The plaintiff alleged basic trademark infringement as well as bad faith behavior in violation of ACPA. In 2002 the District Court ruled that Artco had asserted no meritorious defense to the claims, nor could it, and so the court entered a default judgment against Artco.

In perhaps the biggest case of its kind, telecommunications company Verizon in 2008 won a \$33 million cybersquatting judgment against Internet firm OnlineNIC. The defendant had registered more than 650 domain names that were identical to, or confusingly similar to, Verizon trademarks. Apparently this was done specifically to attract consumers attempting to visit Verizon websites and get them to click on other links instead, for which OnlineNIC would get paid per click.<sup>67</sup>

## UNFAIR COMPETITION

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The property-based protections of copyright and, to a narrower extent, trademark are the most significant ways in which communicative creations are protected against unauthorized use. But in both areas several threshold requirements must be met before any protections apply. Sometimes materials are appropriated for business purposes in a manner that seems patently unfair, but no recourse is provided by either copyright or trademark law. In such cases, the aggrieved party may find a business-related tort that would provide some legal relief.

Among the host of so-called business torts are trade libel, misappropriation of trade secrets, and interference with contractual relations. Invasion of the right

of publicity, examined in Chapter 5, may be considered a business tort as well as a type of privacy tort. In terms of filling the gaps between copyright and trademark protection, though, the most important business tort is unfair competition.

**Unfair competition** is a broad legal term without any one specific definition. Historically, the concept developed as a tort primarily concerned with wrongful conduct by a commercial enterprise that results in business loss to another, ordinarily by the use of deceptive means to draw customers away from a competitor. Under modern state statutes, the term is sometimes used even more broadly, as an umbrella term to cover such unlawful practice subcategories as false advertising (discussed in Chapter 12). Here, the concern is the common law notion of unfair competition as it may apply to protect communicative creations from unauthorized use by others.

One of the classic unfair competition cases is *International News Service v. Associated Press*, a 1918 Supreme Court decision. At the time the two news cooperatives were engaged in head-to-head competition in the business of providing timely news to hundreds of member newspapers across the country. In the course of this competition, INS resorted to copying AP news from bulletin boards (remember, this is 1918) and from early editions of AP member newspapers, quickly rewriting it, and then telegraphically transmitting it as its own product. Through this process the pirated INS news could appear in western papers issued at least as early as in those served by AP.

The Associated Press sued, and it obtained a preliminary injunction against INS use of AP news until the competitive benefit of timeliness had passed. The U.S. Supreme Court upheld the injunction. It was not a matter of copyright infringement, the Court noted, because the factual substance of news is a matter of public domain. Therefore, AP could not prevent the purchaser of a newspaper—including INS—from spreading knowledge of its contents. However, the relationship between business competitors is subject to the additional limits of unfair competition law. Wrote the Court:

[INS] admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped. . . .<sup>68</sup>

Contrast this with the 1997 case of *NBA v. Motorola, Inc.* Motorola manufactured the SportsTrax personal paging device, and Sports Team Analysis and Tracking Systems (STATS) supplied game information that is transmitted to the pager.

The pager's one-and-a-half-inch square screen can display considerable information about basketball games in progress, including score changes, team foul status, and the time remaining per quarter. The information is obtained from game broadcasts and is updated every two minutes, with a two-minute lag between the live action and when the information appears on the pager. The National Basketball Association sued, claiming unfair competition by misappropriation under New York law. But the federal Court of Appeals sided with Motorola and distinguished this case from INS:

To be sure, some of the elements of a "hot-news" INS claim are met. The information transmitted to SportsTrax is . . . time-sensitive. Also, the NBA does provide . . . information like that available through SportsTrax. . . .

However, there are critical [differences]. . . .

With regard to the NBA's primary products—producing basketball games with live attendance and licensing copyrighted broadcasts of those games—there is no evidence that anyone regards SportsTrax . . . as a substitute for attending NBA games or watching them on television.<sup>69</sup>

Furthermore, as to the market for real-time game stats, SportsTrax is not free-riding off the NBA's own services, the court said. "Motorola and STATS expend their own resources to collect purely factual information. . . . They have their own network and assemble and transmit data themselves." This was not a case of collecting facts from an NBA pager service and transmitting them to SportsTrax pagers, the court noted.

Among the most important ways that unfair competition law fills in the gaps left by copyright and trademark is by protecting titles. Mere titles of individual works, you will recall, are not protected by copyright law, and except for titles of periodicals, neither are they protected under trademark. Yet the palming off of a confusingly similar title may be enjoined under unfair competition law.

For example, in a 1979 case Orion Pictures sued a paperback book publisher to restrain it from using the title *A Little Romance* on a novel. The claim was made under the common law standard for unfair competition and also under Section 43(a) of the Lanham Act—a broad federal statute under which many unfair competition claims are made. The defendant had legitimately secured from the original French author the right to publish the novel in the United States; Orion had purchased film rights to the story. But Orion came up with a new title for its film version, and the book publisher adopted the same title in an effort to capitalize on the substantial publicity that was being generated for the film. The title *A Little Romance* had come to be associated in the public's mind with the particular Orion production, the court found. Therefore, the title could be protected from use by others if ordinary, prudent consumers would be misled or confused about the relationship between the works. Such confusion was likely in this case, the court ruled, and an injunction was granted.<sup>70</sup>



## Summary Points

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**Copyrights are a form of property**—property vitally important to individuals and businesses engaged in the production of entertainment and other forms of mass communication. Rights to copyright arise automatically, without legal formalities, and copyrights may be bought and sold much like other kinds of property.

**Works are copyrightable** if they qualify as original works of authorship fixed in any tangible medium of expression. Only the manner of expression is protected, not facts or ideas.

**It is important to know** whether copyrighted materials are works made for hire, because this distinction determines both the identity of the initial owner and the duration of protection.

**In the professional world**, interests in valuable copyrights are granted to others through licensing agreements. Music licensing is a particularly complicated field, with its own special rules.

**The main legal avenue** for enforcing copyrights is a civil lawsuit for infringement; often the key defense is the doctrine of fair use.

**With the Copyright Act of 1976** the federal government has chosen to exercise exclusive jurisdiction over the field of copyright law.

**Trademarks, another form of intellectual property**, are words, symbols, and other creations used to identify businesses, products, and services. Trademarks are protected under both state and federal law.

**Trademark rights arise automatically** through use of a distinctive mark in commerce, and protection is enhanced by government registration.

**As a general rule, if no valid copyright or trademark** exists in a particular creative work, it may be freely copied by others. However, if the unauthorized use is likely to deceive the public at the expense of another business enterprise, the tort of unfair competition may be alleged.

**In the chapter Hypothetical**, you will need some copyright clearances. Even though the still photos may have previously been published as news, that fact doesn't convert them to the public domain. You will need a license from each publication or news service that owns desired photos. (And you may also need releases from the athletes who appear in those photos, as discussed in Chapter 5.) Same for the music. Even if you don't use the hit recording, you need a license for the underlying composition. You would also want the license to include an option for a second year, if the campaign is successful. And the

exclusivity you desire could be build right into the license agreement, too. To get maximum protection for the trademark, it should be registered with the federal trademark office.

## Discussion Questions

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1. Based on this chapter's discussion of music copyrights, do you think it would be a copyright violation to purchase a popular CD at a record store and then play it at a dorm party (without consent of the copyright owner and without an ASCAP or BMI license)? What if students are charged a fee to cover refreshments and entertainment at the party? Could you play the CD at a party if it were held at a cocktail lounge? Could you legally play the CD for an aerobics class you teach?
2. Following the *Kinko's* decision, some educators argued that Congress should enact a broader fair use exemption for education-oriented copying. Do you agree, or might a relaxation of copyright protections have counterproductive results? When music is played for the benefit of customers, a copyright fee is usually owed to the owner of the composition. Should a similar fee be owed to authors or publishers when books are lent by a library?
3. If copyright law does not protect ideas, what's to stop a magazine, publishing company, or film studio from stealing the ideas in any materials you send to them? Should ethics, professionalism, and reputation be the only bars to stealing ideas, or should the law afford some special protection to ideas that are voluntarily submitted to others? What legal theories might be used to afford such protection? How about contract law?
4. Would it qualify as fair use to use an exact replica of cartoon character Bart Simpson in the masthead of a college newspaper? What if the Bart sketch were used in a political cartoon? Would it make a difference if Bart were being criticized in the political cartoon? Could an altered sketch of Bart—a parody—be used in the paper? In the masthead?
5. Software developers have recently marketed a number of programs, such as *MovieMask* and *ClearPlay*, intended largely to sanitize movies by screening out or altering foul language and violent or sexual scenes. And in 2003, some video stores were renting altered, sanitized tapes of Hollywood hits. Similar technology can be used for a contrary purpose, too, to spice up films by adding rough language and more skin. Is this a blatant form of copyright infringement, or the rightful privilege of a DVD owner? Does it matter whether the copy of the film is substantively altered or merely muted in places?

## Key Terms

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blanket licenses	master use license
collaboration agreements	moral rights
collective works	performance license
compilation	public domain
compulsory licensing	secondary meaning
copyright	service mark
derivative work	sound recording
dilution	statutory damages
fair use doctrine	synchronization license
generic term	trademark
intellectual property	trade name
joint works	unfair competition
licensing	work made for hire

# The FCC and Broadcast Licensing



*After completing this chapter, you should*

- **Understand** the rationales for government regulation of the broadcast media.
- **Appreciate** the First Amendment issues arising from regulation of broadcast stations.
- **Understand** the delegated powers of the FCC and the agency's operating methods.
- **Know** the process by which broadcast stations are licensed and relicensed and how that process has changed dramatically in recent years.
- **Understand** the ownership limitations historically placed on broadcast companies and the political battle surrounding those constantly changing limitations.

## INTRODUCTION

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The legal rules discussed so far apply to all media. Libel law, invasion of privacy, copyrights, information access, unfair competition—these can be everyday concerns for professionals in all print and electronic media, and the basic principles

## Hypothetical

### A Choice FM in Cypress City

Assume that, after several years working as a media consultant, you have an opportunity to become a broadcaster yourself. A longtime friend of yours has invited you to become a partner with him, fifty-fifty, to acquire and operate a new FM radio station that the Federal Communications Commission has decided to license in Cypress City. The idea is appealing to you because the newly available frequency is in an economically thriving, 350,000-population market, your friend has capital to invest in creating the station, and you would serve as the station's general manager. Furthermore, none of the market's nine existing radio stations offers a classic rock 'n' roll format, which is your plan.

On the other hand, you wonder about how smoothly this process will unfold. For one thing, you've heard that a number of other media companies are also planning to vie for the FM license. And a local citizens' group, formed last month to lobby for an all-news station, says that news is the market's most obvious radio need and that it will formally oppose any other kind of format for the new frequency.

Even more troubling, though, is that your prospective partner may come to this process with some baggage, so to speak. Three years ago he purchased a TV station elsewhere in the state and, in the license transfer materials filed with the FCC, he claimed a clean record. In reality, though, you know that he was convicted of a felony drug charge in another state in 1989, and you wonder what might happen if the FCC discovers this. Also, your friend is already a 33-percent owner of the only daily newspaper serving the community.

What are your chances of getting the available FM license, and how will the process actually work in the era of auctions? Does it work to your advantage to be a newcomer to broadcast ownership? Might anything about your partner present a significant hurdle? Are there any First Amendment rights to assert here?

are the same regardless of medium. But the broadcast media are burdened by regulations over and above the laws that apply to communicators generally.

The fact is that over-the-air broadcasters, and to a lesser extent cable and satellite radio and TV operators, are subject to licensing schemes, mandatory technical standards, ownership limitations, and even content regulations—many of which would be considered intolerable if applied to U.S. print media or the Internet. Most of these regulations emanate from the Federal Communications Commission, and many of them are technical and engineering standards beyond the focus of this book. This chapter will look at the FCC itself and how the federal government controls access to the broadcast media. (Chapter 10 will examine the most significant content controls that apply to radio and television.)

Keep in mind as you read this chapter and the next that the law of broadcast changes more rapidly than any other area of law discussed in this book. Sometimes the changes are relatively minor adjustments to FCC regulations. But the changes can also be bold. For example, this chapter will refer to the Telecommunications Act of 1996, which made sweeping changes to broadcast law, particularly with regard to ownership and licensing. Largely a package of deregulatory legislation, the 1996 act encouraged greater competition among electronic media industries. Yet within weeks after passage of the act, formal efforts arose in Congress to repeal portions of it. This is the fluid nature of electronic media law.

## THE RUDIMENTS OF BROADCAST REGULATION

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The term **broadcasting** is used narrowly in this chapter to mean the transmission of radio or television signals for intended reception by the general public. Broadcasting is distinguished from transmissions that are intended for a select number of identified receivers—such as communications for police cars, ambulances, aircraft, military stations, and satellites—which are called point-to-point communications. Broadcasting must also be distinguished from methods of delivery that do not use the airwaves, such as the delivery of television programming by terrestrial cable (special rules for cable TV are discussed *infra*).

### USE OF THE SPECTRUM

Broadcasting is achieved by harnessing electromagnetic energy of particular wavelengths. Electromagnetic energy takes many forms, among them X rays, ultraviolet rays, visible light, and the electric current that powers household appliances. The **radio spectrum** is the range of electromagnetic waves that can be used for broadcasting. It is an amazing resource, a form of radiant energy by which communications can be sent thousands of miles at the speed of light. From a legal perspective, though, one of the most significant aspects of the radio spectrum is its limited availability.

#### *A Limited Resource*

America's first radio station went on the air in 1920 and was soon followed by hundreds of others. By the mid-1920s, radio chaos existed in some parts of the country. Station signals interfered with one another, threatening the viability of an exciting and influential medium. The Supreme Court described the situation as it existed in 1926:

New stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard.<sup>1</sup>

This predicament arose quickly because the radio spectrum is a finite resource. The spectrum can accommodate only a limited number of different broadcast frequencies. And if two or more stations attempt to broadcast at the same frequency within a given geographical area, the result is interference, which makes the broadcast signals worthless. (When done deliberately, such as between hostile nations during wartime, interference with radio signals is called jamming.) The bottom line was that the benefits of broadcast would be obliterated if stations and individuals were permitted to transmit at any wavelength, with any power, and at any time they chose.

In an attempt to salvage the new medium, the secretary of commerce in the mid-1920s fashioned an allocation scheme that included the assignment of a specified frequency to each station. The secretary also attempted to limit the power and hours of operation so that multiple stations could share particular frequencies. Still, the federal government was overwhelmed with frequency requests and, when a federal court ruled that the secretary of commerce had no authority to impose restrictions on broadcasters, the coordination effort was abandoned. In 1926, with nearly one thousand unregulated stations on the air across the United States, President Calvin Coolidge appealed to Congress to enact a comprehensive radio law.

### ***Government Options***

Congress was faced with essentially three options for dealing with domestic use of the choked and chaotic airwaves in the mid-1920s:

The first possibility was to commandeer the airwaves and create an entirely public system in which all broadcast stations were owned and operated by the government. This would ensure orderly use of the electromagnetic spectrum over which radio waves are carried because government, as the manager, would coordinate its stations to operate only at a frequency and level of power that would avoid interference with one another. Further, the government would operate only the number of stations it deemed necessary to meet society's needs.

A second option was simply to let the private marketplace evolve on its own, with individual spectrum disputes resolved in the courts. This laissez-faire approach had philosophical appeal, but it would put tremendous pressure on the court system to fashion case-by-case solutions. The courts would be left with the specialized task of administering a complicated patchwork of stations.

The third option was essentially halfway between the other two: Private ownership of broadcast stations would be allowed, but only in accord with a government allocation process. Under this option listeners could benefit from the creativity and competitiveness of commercial broadcasters and from the exhaustive oversight of government.

Government opted for the third course of action. With the Radio Act of 1927, Congress created a Federal Radio Commission to divvy up the radio spectrum

and assign frequencies to radio stations. The Radio Act determined the legal framework for the future. It firmly established the notion that the radio spectrum would be treated as a public resource in which no individual could claim a property right. The spectrum was to be treated much like a national waterway, where the individual users are private concerns, but the waterway itself is controlled by government.

## THE COMMUNICATIONS ACT OF 1934

The Radio Act was replaced by the Communications Act of 1934—the basic legislation that governs broadcasting today. Under the Communications Act, the Radio Commission was renamed the Federal Communications Commission (FCC), and its jurisdiction was expanded to cover other forms of electronic communication, including telephone.

The Communications Act, as amended over the years, is a voluminous package of statutes found in Title 47 of the *United States Code*. As it relates to broadcasting, the act states its purpose as follows:

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. . . .<sup>2</sup>

The Communications Act specifically states that the FCC is not granted the power of censorship and that the agency shall not “interfere with the right of free speech by means of radio communication.”<sup>3</sup> But this censorship prohibition has been interpreted narrowly by the courts. Another piece of guiding language in the act—a phrase often cited in court opinions—is that the FCC shall carry out its prescribed powers “as public convenience, interest, or necessity requires.”<sup>4</sup> This public interest directive has been interpreted to confer considerable powers of judgment upon the commission.

The right of Congress to enact broadcast regulations, and in turn to delegate authority to the FCC, is derived from the interstate commerce clause of the U.S. Constitution.<sup>5</sup> Initially some broadcasters questioned whether federal jurisdiction could extend to broadcast signals that did not cross state lines. But the federal government argued that its jurisdiction extended to all radio signals because even purely local transmitting can interfere with the signals that do cross state lines. The Supreme Court sided with the federal government on this point in 1933.<sup>6</sup> Furthermore, the federal government has laid claim to exclusive jurisdiction over broadcast regulation; the ability of states to regulate even broadcasters operating entirely within their borders has been preempted by Congress and the FCC.



The Communications Act of 1934 (albeit added to and modified) remains the basis of broadcast regulation, but increasing use of wireless and Internet technology inspired Congress to craft the Telecommunications Act of 1996. Although the 1996 act changed many aspects of broadcast licensing and ownership, it did not affect government's fundamental stance that over-the-air media require a particular kind of oversight. (The effects of the 1996 act will be discussed in detail under "Station Licensing.")

## LIMITED FIRST AMENDMENT STATUS

By the late 1900s, Americans had come to rely on the broadcast media as sources of serious news and public affairs programming as well as of entertainment. Today, in fact, many people depend on broadcast media as their *primary* source of news. Yet broadcasting has never been accorded the full range of First Amendment privileges enjoyed by the print media.

In the early days of broadcasting, the judicial view was essentially that broadcast communication was merely a cheap form of entertainment—an inferior form of speech that deserved little protection. (The courts took a similar view of motion pictures in the early 1900s.) A 1932 case serves well to illustrate the early disparity between print and broadcasting.

### ***Silencing Bob Shuler***

In Los Angeles the Reverend Bob Shuler had been granted a broadcast license in the name of his Trinity Methodist Church. Shuler was a rigid moralist who took it upon himself to wage war against the vice and corruption that existed in the city during the Prohibition era. Shuler went on the air two evenings a week, and by the late 1920s, *Bob Shuler's Civil Talk* was one of the most popular radio shows in Los Angeles. Shuler used his program to make ruthless attacks on government officials and other individuals and groups. He charged that the mayor was letting a gangster run the city, that the police chief was protecting organized crime, and that the district attorney took bribes. Shuler also made disparaging statements about Jews and the Catholic church.

Then it came time for Shuler to renew his radio license. During a lengthy review hearing, he faced high-powered opposition. Ultimately, the Federal Radio Commission decided not to renew the license, and it ordered Shuler off the air immediately. The basis for the decision was that Shuler's broadcasts were sensationalized and factually reckless attacks and therefore were not in the public interest. The federal Court of Appeals upheld the commission, holding that the agency was within its rights to pull the license in an effort to prevent abusive, defamatory broadcasts in the future.<sup>7</sup>

The *Shuler* case is particularly revealing because it was decided less than a year after the Supreme Court's landmark ruling in *Near v. Minnesota*.<sup>8</sup> In *Near*

(discussed in Chapter 2), authorities sought an injunction to prevent J. M. Near from continuing to disseminate scurrilous charges against local public officials. Like Shuler, Near had made a habit of attacking those who violated Prohibition; he railed against public officials who failed to shut down gambling and other vices; he even distributed anti-Semitic statements. In many respects the facts of the *Near* case are strikingly similar to those in Shuler's—except for one critical fact: Near made his comments in a newspaper. The Supreme Court struck down the injunction against Near as an unconstitutional prior restraint. Yet the Court of Appeals did not apply this fresh precedent to Shuler's case.

### ***The Scarcity Rationale***

As the content of broadcasting became more sophisticated, it also became necessary for the courts to explain in greater detail exactly why the broadcast media should be legally distinctive. Several regulatory justifications have been articulated over the years. For example, it is sometimes stated that broadcasters are public trustees of the airwaves. Courts have also said that broadcasting is distinctive because it enters homes in an intrusive fashion and that it possesses a unique power to influence the audience, especially children.

The primary justification for broadcast regulation, however, is known as the **scarcity rationale**, which holds that, because the usable radio spectrum is limited and cannot accommodate everyone who might wish to be a broadcaster, it is incumbent upon government to manage access to the spectrum. And because government must limit access to a select number of broadcasters, it also has a right to mandate how they will operate to best serve the public.

The initial scarcity rationale case was *NBC v. United States*, a Supreme Court decision from 1943. The FCC had adopted several so-called chain broadcasting regulations, intended to combat what it deemed abuses in the relationships between radio networks and affiliate radio stations. One regulation prohibited networks from demanding that affiliates air programming from no other source. Another regulation prohibited a network from committing its programming to just one station in a region. And another prohibited contract clauses that limited affiliates' ability to reject network programming. These and other rules were deemed necessary to protect the "public interest," as the FCC is required to do under the Communications Act of 1934. But the radio networks challenged the rules as unconstitutionally arbitrary and capricious and beyond the licensing powers conferred on the FCC.

The Supreme Court began its analysis by noting that "the radio spectrum simply is not large enough to accommodate everybody" and that Congress therefore endowed the FCC with broad licensing and regulatory powers. "The Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic," the Court said in upholding the regulations. And the touchstone for exercising this

power is the “public interest, convenience, or necessity.” The Court held that the Communications Act did not limit the FCC to dealing with technical and engineering aspects of broadcasting. Rather, the plain language of the act made it clear that the FCC was empowered to deal with any impediments to effective use of the radio spectrum. Furthermore, the Constitution would not stand in the way, because the right to free speech does not include the right to use the limited facilities of radio without a license, the Court said, and the licensing system and regulations were a proper extension of Congress’ power over commerce.<sup>9</sup>

### **The Red Lion Case**

Some 25 years later, in the 1969 case of *Red Lion Broadcasting Co. v. FCC*, the Court made its most elaborate defense of the scarcity rationale. In *Red Lion*, the Court upheld two fairness doctrine–based content restrictions, the Political Editorial Rule and the Personal Attack Rule, both of which require broadcasters to provide air time for certain individuals to respond to criticism. (These rules are discussed in Chapter 10.) *Red Lion* is a landmark decision because it firmly established spectrum scarcity as the main justification for government intervention in broadcasting—not only in licensing, but in content as well. (See the *Red Lion Case Excerpt* that follows.) It is interesting to compare *Red Lion* with the Court’s 1974 decision in *Miami Herald Co. v. Tornillo* (discussed in Chapter 2), in which the Court unanimously struck down a statute that attempted to give political candidates a right of reply in newspapers.

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## ***Red Lion Broadcasting Co. v. FCC***

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**395 U.S. 367 (1969)**



From the opinion of the Court by Justice White:

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. . . .

Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them. For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination.

Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. . . . The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It is this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934. . . . It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. . . .

. . . A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in §326, which forbids FCC interference with "the right of free speech by means of radio communication."

. . . But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . .

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each

frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. . . . As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on “their” frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others a right to use. . . .

In view of the scarcity of broadcast frequencies, the Government’s role in allocating those frequencies, and the legitimate claims of those unable without government assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.

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### ***Is the Scarcity Rationale Still Valid?***

With the *NBC* and *Red Lion* decisions, the Supreme Court puts its imprimatur on the notion that broadcasting is different from other media—from the standpoint of the First Amendment—and that government has the power to compel responsible use of the limited spectrum resource. Few would have questioned that the spectrum was indeed a scarce resource in the 1920s or that government needed to step in with some regulations to alleviate a chaotic situation in the early years of broadcasting. In later decades, however, the broadcast industry grew increasingly critical of government’s regulatory forays into matters other than purely technical, spectrum-usage issues. Furthermore, in the years since the *Red Lion* decision, legal authorities have argued increasingly that the scarcity rationale—the key underpinning for broadcast regulation—is no longer a valid concept.

A reexamination of the scarcity rationale is needed, some argue, because circumstances have changed dramatically since the 1920s—and even since 1969, the year *Red Lion* was decided. Though the spectrum remains a finite resource, technically speaking, today’s marketplace is overflowing with so many channels of communication—broadcast and otherwise—that in practical terms the consumer is faced with a virtual barrage of programming choices.

For example, in the late 1960s roughly 6,000 radio stations and 700 television stations were operating in the United States. But in 2009, those numbers were more than double: about 14,000 radio stations and 1,800 TV stations. The increases are attributable in part to enhanced broadcast technology that uses spectrum space more efficiently and to more sophisticated allotment of the spectrum. In addition, most U.S. consumers today have access to cable and satellite TV systems, many of which provide 100 channels or more. During this period the number of daily newspapers has declined, yet newspapers are not subject to government regulation; broadcasters are—on the ground of spectrum scarcity.

In 1986 the U.S. Court of Appeals for the D.C. Circuit bluntly attacked the logic behind the scarcity rationale and questioned whether the concept would long remain constitutionally sound. Wrote the court:

. . . [T]he line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytic tool, particularly with respect to new and unforeseen technologies, inevitably leads to strained reasoning and artificial results.

It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. . . .

There may be ways to reconcile *Red Lion* and *Tornillo* but the “scarcity” of broadcast frequencies does not appear capable of doing so. Perhaps the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media . . . or announce a constitutional distinction that is more usable than the present one.<sup>10</sup>

The FCC itself has occasionally expressed doubts about the continued legal validity of the scarcity rationale, and between the mid-1980s and mid-1990s it acted to deregulate some aspects of broadcasting. During that period Congress also generally favored deregulation. And the federal Court of Appeals for the D.C. Circuit helped propel deregulation by demanding from the FCC a clear justification for all regulations that were challenged and brought before the court.

As far back as 1984, the Supreme Court itself acknowledged mounting criticism of the scarcity rationale and hinted that it might reconsider its constitutional approach to broadcasting if it were to receive “some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.”<sup>11</sup> Should the Supreme Court use a future case to overturn its *Red Lion* justification for regulation, much of current broadcast law could be rendered unconstitutional.

But for now, the broadcast media still do not enjoy the same First Amendment freedoms as print media or the Internet, and the scarcity rationale is still operative in the eyes of the law. And for those seeking a license, frequencies do indeed appear scarce. Despite the rapid growth of alternative electronic media, the demand for radio and television broadcast frequencies generally is greater than the supply.

Further deregulation efforts stalled during the eight years of the George W. Bush administration, as the broadcast industry entered a period of tough economic

times and the FCC itself became mired in heavy criticism. As the Obama administration took over and new commissioners were appointed to the FCC, the agency was in the middle of at least four significant debates: (1) Constitutionally speaking, should broadcasters enjoy a greater First Amendment zone of freedom from regulation? (2) Politically, had the FCC become too ideologically driven, fragmented, and improperly managed? (3) From a policy perspective, where is further regulation truly needed, and in what direction, based on real evidence? And (4) at a time when many broadcasters are slashing expenses and facing bankruptcy reorganization to stay afloat, should the role of the agency change? Should the agency's actions be focused in such times on encouraging creativity, clearing the path for innovation, and fostering investment in the industry?

## THE FCC

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Because the Federal Communications Commission plays a central role in virtually every phase of broadcasting, from spectrum allocation to program fairness, it's appropriate to take a closer look at that body. Legally speaking, what is the nature of the FCC, exactly, and how does it operate?

### JURISDICTION AND POWERS

The FCC is one of more than fifty independent agencies in the federal government. Though created by Congress, these agencies officially reside in the executive branch, which is responsible for their administration. In creating these agencies, Congress essentially delegates some of its lawmaking authority to address concerns in specialized, often technical, areas that go beyond the scope of ordinary legislation.

In terms of regulatory activity, the FCC is among the very largest of these agencies, along with the Federal Trade Commission, Securities and Exchange Commission, National Labor Relations Board, and a few others. These agencies actually are oddities in our constitutional system, blurring the lines between the separation of powers. They create regulations, thus serving a legislative function. They police their regulations and enforce them, serving an executive function. And they even hear and decide cases, thus exercising a degree of judicial power.

The 1934 act granted the FCC a long list of powers over broadcast, ranging from assignment of frequencies to setting station operation times to dictating standards for transmission apparatus. In recent years the FCC has even flexed its authority by enacting rules pertaining to stations' employment practices. In addition to regulating radio and television broadcasting, the commission today is charged with regulating interstate and international communications by wire, satellite, and cable.

The FCC is headed by five commissioners, appointed for five-year terms by the president and confirmed by the Senate. No more than three commissioners may be from any one political party, and the president designates one commissioner to serve as chairperson. The commissioners are ultimately responsible for policy making and for adjudicating disputes—within the statutory confines set by Congress and the constitutional limitations defined by the courts.

The FCC employs a large staff, organized by function into six bureaus and ten staff offices, which were reorganized somewhat in 1999 and again in 2002. Most important for our purposes are the Media Bureau, which handles broadcast licensing and regulation, and the Enforcement Bureau, which prosecutes complaints. About one-fifth of the FCC's staff employees work in field offices around the country, where they monitor usage of the radio spectrum, inspect broadcast stations, conduct operator examinations, track down unauthorized transmitters, and gather technical data for the commission's use.

### ***Gatekeeper to the Spectrum***

The FCC's primary task of governing usage of the radio spectrum actually involves the following three separate processes:

**Spectrum allocation** is the task of reserving certain portions of the radio spectrum for particular uses. For example, certain frequency ranges within the radio spectrum are reserved exclusively for use by AM radio, FM radio, VHF television, UHF television, police and fire communications, satellite communications, and so on. Broadcasting is just one of many uses the radio spectrum must accommodate. In fact, the vast majority of the usable radio spectrum is allocated to government, military, and space communications.

**Band allotment** is the task of deciding how many channels will be available within each usage area. For example, the FM radio band, which is located between 88 and 108 megahertz within the radio spectrum, is allotted one hundred assignable channels. The challenge for the FCC has been to allot as many channels as possible while ensuring that the bandwidth of each channel is sufficient to provide a buffer against signal interference.

**Channel assignment** is the process of deciding which applicants will be awarded which channels. This is formally accomplished through station licensing. Broadcast licensees are authorized to broadcast at a particular channel, meaning a particular frequency, and at a particular power. This frequency is essentially the station's address on the radio spectrum.

All three processes—allocation, allotment, and assignment—present difficult challenges to the FCC, and all have been controversial in recent years as the commission has attempted to make room on the spectrum for new services and technologies. As you might expect, some controversies cross international boundaries and are beyond the FCC's power to resolve on its own. By treaty, more



than one hundred nations are members of the International Telecommunication Union, headquartered in Geneva, Switzerland. The ITU has played a major role in coordinating spectrum allocation policy around the globe.

## PRACTICE AND PROCEDURE

The FCC and the other independent federal agencies have their own way of doing business. All follow basic procedural safeguards, articulated in the Federal Administrative Procedure Act,<sup>12</sup> that ensure adequate public notice of agency actions and a right to be heard, for example. Yet each agency also has its peculiar methods and terminology.

### **Rule Making**

On the rule-making side, the FCC sets in motion a formal process that takes months or even years to complete. Sometimes the basis for starting this process is a Petition for Rulemaking, filed by an interested party seeking to have a rule or regulation created, amended, or repealed. Other times it's the FCC's own initiative that sparks the process.

The FCC's first step may be to issue a Notice of Inquiry on the particular issue in question. This is essentially an invitation for interested parties, such as broadcast licensees or cable operators, to submit their views and data to the commission. When the FCC is ready to propose or adjust an actual regulation, it issues a Notice of Proposed Rulemaking and sets a period of some months for public comment. This notice is posted on the FCC's website and also in the *Federal Register*. In addition to collecting written comments, the commission may hold one or more public hearings before voting on the final form of a regulation. The commission's final rule-making actions are publicly announced in a Report and Order that contains the wording of the new or revised regulation and provides a justification for the action. The regulation is then codified in Title 47 of the *Code of Federal Regulations*.

### **Adjudication**

On the adjudication side—which may include enforcement or licensing disputes, for example—proceedings may take a number of paths. But here's a typical example: When it appears that a broadcast licensee has violated a provision of the Communications Act or FCC rules, the FCC will serve the licensee with a Notice of Violation before holding formal proceedings to revoke or suspend a license or even to place a formal sanction notice in the licensee's file. If the violation is one for which a fine may be assessed, then the FCC also serves a Notice of Apparent Liability to Monetary Forfeiture. The licensee has ten days to respond with a written answer.

Further evidence is gathered by FCC staff and then a formal hearing is conducted. The hearing is presided over, in most cases, by an administrative law

judge, who then issues an initial decision. If there is no appeal, this initial decision then becomes the final decision of the commission. But a party to the dispute may appeal the initial decision to the full five-member commission. The commission may decide to hear additional oral arguments, require written briefs, or ask the administrative law judge to take further evidence. The commission then issues a final decision containing findings of fact, conclusions, and an appropriate order indicating the sanction or relief. The commission's decisions are reported in the *FCC Record*. The commission's decisions, if appealed, go directly to the U.S. Court of Appeals—usually for the D.C. Circuit—and ultimately to the U.S. Supreme Court.

## STATION LICENSING

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This section will take a streamlined look at the FCC's broadcast licensing practices and standards and its related ownership and equal employment opportunity (EEO) rules. This may seem odd because this book focuses on the law that directly affects communication *content*, rather than the law that pertains to such operational aspects as business licensing and hiring practices. In the case of broadcast, however, keep in mind that most of these license-related rules have actually been created with an eye to influencing broadcast content and overall spectrum usage in some way. Perhaps for that reason, considerable political and social controversy often accompany these rules.

The Communications Act of 1934 specifically requires would-be broadcasters to apply for a license, and the act authorizes the FCC to grant licenses if the applicant will serve “the public interest.” Beyond the vague public interest standard, however, the act left it largely to the commission to determine how the day-to-day licensing process would work. What minimum qualifications will be required for applicants? If there are several applicants for one available frequency, how will the FCC decide among them? When the term of a license expires, will the existing licensee be accorded a preference for renewal? Or should the preference go to a new applicant?

These kinds of sticky questions led the FCC down a path of elaborate and controversial licensing criteria and time-consuming, expensive procedures that backlogged the agency. Thus, the FCC and Congress looked increasingly to awarding licenses on the basis of an auction or a lottery. Such methods are quicker, and they lessen the opportunities for political favoritism or “political correctness” to creep into licensing. On the other hand, many believe that to parcel out licenses based on auctions or lotteries is to abdicate the responsibility to license in the public interest. These critics argue that, although the traditional method may be more difficult and cumbersome, the government is obligated to award broadcast licenses on some assessment of merit.

All local broadcast stations must have an FCC license. A license is not required to operate a network, however, because a network is not directly engaged in broadcasting. As a practical matter, all of the major TV networks do hold broadcast licenses, but this is because each network also owns several stations in lucrative markets, not because the networks provide programming to affiliates.

## THE INITIAL LICENSE

Sometimes a designated broadcast frequency is unused and available in a given community, or the FCC can be persuaded to designate an additional frequency. The process to obtain this initial license for a broadcast station can be a fairly routine matter if there is no opposition to the application and no competition for the frequency. The applicant simply needs to meet certain criteria established by the FCC. The exact process differs somewhat between license applications for AM radio, commercial FM, educational FM, and television. But what follows is a general description.

### ***Basic Qualifications***

All potential broadcast licensees are assessed in the following areas:

- **Technical.** Applicants must show that their stations will comply with FCC standards pertaining to such technical matters as transmission facilities, interference avoidance, and signal quality.
- **Financial.** Applicants must have adequate capital to support their proposals. The traditional guide has been that an applicant should have sufficient funds to operate the proposed station for a few months with little or no advertising revenue.
- **Character.** Applicants must be of good character—as measured by a lack of serious legal violations in one’s past. The FCC is likely to deny a license to anyone who has previously lied to the commission, engaged in fraudulent programming, or committed felonies such as federal drug offenses.
- **Citizenship/ownership.** Applicants must be U.S. citizens, and their applications must be consistent with station ownership limitations. (Ownership limitations are discussed later in this chapter.)

The FCC is generally not concerned with an applicant’s specific programming intentions. However, the commission can refuse a license even when the basic qualifications are met, if the commission is doubtful that granting the license would serve the public interest. Therefore, in addition to meeting the basic requirements, prudent applicants will show the FCC how the proposed programming is based on some assessment of local community needs.

In the 1970s the FCC required that all applicants conduct formal research of the communities in which they proposed to broadcast. The research included

random sample telephone surveys and personal interviews with members of certain local institutions. This elaborate community study, called **ascertainment**, was an onerous requirement. In the 1980s, however, as part of an FCC move toward partial deregulation, the commission dropped the formal ascertainment requirement. That left community research strictly voluntary, but applicants were still well-advised to conduct some kind of local-issues ascertainment to help convince the FCC that the license applicant will indeed serve in the public interest. In 2009, as part of its inquiry into the status of “localism” in broadcast, the FCC was considering ways to again require some formal process of assessing issues and issue-related programming in the licensee’s service area.

A broadcast station’s particular call letters, which can become an integral part of a station’s local marketing effort, may be requested by the licensee (see Exhibit 9.1).

### ***The Contested Application***

In some cases, members of a community may contact the FCC to formally oppose an application. This formal opposition may complicate the license process by forcing the FCC to conduct a full hearing that would not be required otherwise. In order to force a hearing, the complaining party must have legal standing to formally oppose the application. This means that the people opposing an application must have a direct and substantial stake in the outcome.

## **EXHIBIT 9.1 Station Identification and Call Signs**

Since the early days of wireless telegraphy, radio stations have had their own identification. Under international agreement, since 1927 the alphabet has been divided among nations for basic call sign use. The United States, for example, is assigned three letters—N, K, and W—to serve as initial call letters for the exclusive use of its radio stations. It also shares the initial letter A with some other countries. The letter A is assigned to the Army and Air Force; N to the Navy and Coast Guard; and K and W to domestic stations, both government and non-government.

... Generally speaking, those beginning with K are assigned to stations west of the Mississippi River and in U.S. territories and possessions, while those beginning with W are assigned to broadcast stations east of the Mississippi. ...

Since the beginning of broadcasting, stations have had the privilege of requesting specific call signs. In requesting their preferences for certain letters of the alphabet, broadcasters have presented combinations of names, places, or slogans. For

example, the letters NBC are used for stations owned by the National Broadcasting Company, CBS for those of the Columbia Broadcasting System, and ABC for the American Broadcasting Companies. Examples of individual station call letters are: WGN, Chicago (“World’s Greatest Newspaper”); WACO, Texas (Waco, Texas); WTOP, Washington, D.C. (“Top of the Dial”); WMTC, Vandevle, KY (“Win Men to Christ”); WGCD, Chester, S.C. (“Wonderful Guernsey Center of Dixie”); and KABL, Oakland, CA, selected its letters to represent San Francisco’s famous cable cars. If a new broadcast station makes no specific request, it is assigned a call sign by the FCC. ...

With the advent of FM and TV in 1941, new call signs for all such stations were not assigned. Rather, since many FM and TV stations were operated by the same AM licensee in the same license area, the general practice was for the associated FM or TV station to simply add “-FM” or “-TV” to the call sign of the co-owned AM station. ...

—FCC Information Bulletin

Often it has been existing station owners in the local community who have opposed the licensing of a new station. An existing licensee has standing to complain, for example, that the proposed new station would cause significant interference with the existing station's signal. If this allegation can be proved at a hearing, the application would be doomed unless it could be amended to solve the problem.

More controversial has been the complaint by an existing licensee that the new station would siphon off advertising revenue, thereby working an economic hardship on the existing station and decreasing its ability to provide quality programming. Should this kind of economic argument ever be considered sufficient grounds to deny a new broadcast license? For many years the FCC entertained these complaints, so long as the protesting licensee alleged that granting the new license would have a deleterious effect on the overall delivery of public service programming—not just on the complaining station's profits. But in 1988 the commission announced that it would no longer consider economic consequences as a ground for denying a license.<sup>13</sup>

Listeners or local citizen groups also may have legal standing to inject formal complaints into the licensing process, thereby forcing an evidentiary hearing. Standing can be established if the consumers raise a valid public-interest issue and if the particular consumers are well-suited to speak to that issue.<sup>14</sup> A license will not be rejected, however, simply because a group of local listeners might object to an applicant's proposed musical format. Citizens' complaints are more common in conjunction with license renewals, when it may be argued that a licensee has not lived up to promises for public affairs programming. It's very unlikely in the chapter Hypothetical, for instance, that the group lobbying for an all-news format could derail the rock 'n' roll station.

### ***Competing Applications***

In reality, it is rare that unused channels lie waiting for a sole license applicant. Available frequencies are often sought by multiple qualified applicants. These are called mutually exclusive applications, because only one of the applicants can be granted the license, to the necessary exclusion of the others. And it was here, with multiple qualified applicants vying for the same frequency, that licensing became complicated and cumbersome.

In this circumstance, the FCC historically conducted a **comparative proceeding**, in which it weighed the relative merits of the competing applicants. When the applicants were fairly evenly qualified, the comparative process could become quite elaborate. It involved the filing of initial documentation, a period for collection of evidence by the applicants, a period for filing written testimony with the agency, a hearing before an administrative law judge, and then another period for applicants to file their final pleadings—all before the administrative law judge rendered a decision. The judge's decision often was appealed to the commission

itself. For the applicant, this route was an expensive and time-consuming proposition. The full comparative process sometimes took three years.

Until 1993 the FCC arrived at its decision in comparative proceedings by considering several factors beyond the basic qualifications for a station license, principally the following:

1. *Diversification of control in media*: In the interest of promoting independence and diversity in broadcasting, the FCC would prefer the applicant with fewer existing ownership interests in mass media.
2. *Full-time participation in station*: In the interest of better accountability, hands-on owners “integrated into management” were preferred over absentee owners. Further preference was given to hands-on applicants who were women or minorities.
3. *Proposed program service*: Minor differences in programming proposals were considered irrelevant. However, the FCC took note of exceptional proposals for public affairs programming.
4. *Past broadcast record*: Unusually good or bad prior behavior in broadcasting was considered in the comparison of applicants.
5. *Efficient use of the frequency*: Applications were favored if they proposed to use equipment that made the best geographic use of the frequency.
6. *Character of the applicants*: In the comparative proceeding the FCC would consider character deficiencies that were not quite serious enough to cause disqualification at the basic-requirements stage.<sup>15</sup>

For each factor, the FCC determined whether one of the competing applicants deserved what was called a preference, or enhancement, and if so, by how much. These slight, moderate, or substantial preferences were then added up to determine who got the license.

In 1993, however, the FCC suspended the comparative process, in response to a court decision, and began to study other options. In *Bechtel v. FCC*, a broadcast license applicant attacked the second comparative factor, integration of ownership, as unconstitutionally arbitrary. The federal Court of Appeals agreed. The FCC attempted to defend the integration policy by arguing that on-site owners, because of their direct financial interest, are more likely than absentee owners to make sure the station complies with all FCC rules and responds to community needs. But the court found no evidence to support the FCC’s claims, and it wrote: “The fact that corporate America generally does not insist upon the integration of ownership and management casts doubt on the Commission’s rosy speculations about the benefits of integration.”<sup>16</sup>

Thus, with one of its comparative preferences invalidated by the court, the FCC decided to suspend the entire process and conduct a fresh, thorough review of the other preferences as well. Years passed, and hundreds of radio and TV license applications were on hold even longer than usual.

### ***The Auction Solution***

Finally in 1999, a radical change altogether discarded the thorny thicket of comparative proceedings. The process now awards mutually exclusive, commercial licenses through an auction. The license goes to the highest bidder, and the bid money to the U.S. Treasury. An auction process for mutually exclusive applications was authorized by Congress in the Telecommunications Act of 1996 and then mandated in the Balanced Budget Act of 1997.<sup>17</sup>

More specifically, the usual process is an “electronic simultaneous multiple-round auction,” which the FCC designed to be both efficient and fair. Instead of selling licenses one at a time, the FCC groups together a number of related licenses and auctions them simultaneously. The prequalified bidders can bid on any of the licenses offered, and the auction closes when bidding has ceased on all licenses in the group. Bidding is multiple-round, meaning that the bids are not sealed and a bidder has the opportunity to top the high bid from the previous round. The FCC has set up an automated auction system that allows it to process hundreds or even thousands of bids, which are made via personal computer. Bidders and other interested persons can track the progress of an auction through the FCC’s website.

The FCC publicly announces the spectrum to be auctioned at least four months in advance. Applications to participate in the auction must be submitted to the FCC at least thirty days in advance, along with a refundable deposit. The size of the deposit determines which licenses the applicant may bid on. Each license is assigned a minimum acceptable bid.

Remember that the auction process is used only for broadcast frequencies for which there are mutually exclusive applications. If an available frequency is identified and draws only one application, it will be awarded upon demonstration of the basic qualifications.

Auction winners are first granted a “construction permit” to assemble the station infrastructure. Upon technical clearance by the FCC, the operating license is awarded.

### ***Minority Ownership***

In a 1978 policy statement, the FCC announced that minority ownership and participation in management could be considered a plus in comparative license proceedings. In order for the minority ownership preference to apply, the applicant had to belong to a racial minority group and had to actively participate in station management. The justification behind this policy was a finding by the FCC that views of racial minorities were inadequately represented in the broadcast media, that greater representation of minority viewpoints would enrich the audience, and that promoting hands-on minority ownership would help accomplish the desired diversity in programming.<sup>18</sup>

In 1990 the minority ownership preference narrowly withstood a constitutional challenge before the U.S. Supreme Court. In *Metro Broadcasting, Inc. v. FCC* the

Court held, 5–4, that granting a preference to license applicants who are racial minorities does not violate the Fifth Amendment’s guarantee of due process and equal treatment by government. In the majority opinion, Justice Brennan stated that the minority ownership policy is valid because it is substantially related to achievement of an important governmental objective—programming diversity. Drawing from language in prior decisions, Brennan wrote:

The Government’s role in distributing the limited number of broadcast licenses is not merely that of a “traffic officer”; rather it is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience and that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. Safeguarding the public’s right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC’s mission.<sup>19</sup>

The minority ownership preference is substantially related to this diversity-in-programming objective, Brennan wrote, because “evidence suggests that an owner’s minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities.”<sup>20</sup>

Justice O’Connor wrote a stern dissenting opinion in *Metro Broadcasting* in which she accused the majority of applying the wrong standard. Her opinion began as follows:

At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class. Social scientists may debate how people’s thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among the individuals based on the assumption that race or ethnicity determines how they act or think. To uphold the challenged programs, the Court [majority] departs from these fundamental principles and from our traditional requirement that racial classifications are permissible only if necessary and narrowly tailored to achieve a compelling interest.<sup>21</sup>

Thus, whereas Brennan and the slim majority found an “important” or “substantial” government interest sufficient, O’Connor believed a much stricter, “compelling” justification was necessary to uphold a race-based preference. O’Connor added that the interest in increasing the diversity of broadcast viewpoints “is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.”<sup>22</sup>

Early in 1992, the U.S. Court of Appeals held that a similar FCC preference in favor of female applicants was an unconstitutional violation of male applicants’ rights under the equal-treatment component of the Fifth Amendment.



The majority opinion was written by Judge Clarence Thomas, shortly before his confirmation to the Supreme Court. Thomas noted that the majority in *Metro Broadcasting* found substantial empirical evidence supporting a link between minority ownership of stations and the stations' programming practices. But this case was different, he said: "Whatever the merit of these assumptions as applied to cohesive ethnic cultures, it simply is not reasonable to expect that granting preferences to women will increase programming diversity."<sup>23</sup>

Then in 1995 the U.S. Supreme Court decided *Adarand Constructors, Inc. v. Peña*.<sup>24</sup> The *Adarand* case did not involve broadcast licenses; it concerned a Colorado preferential policy for minority contracting firms. But the case is significant because the Court overruled the standard used to decide *Metro Broadcasting*, thus calling into question once again the constitutionality of the FCC's minority ownership preference.

Of the five justices in the *Metro Broadcasting* majority, only Justice Stevens remained in 1995. And in *Adarand*, Justice O'Connor wrote for the majority. In *Adarand*, the Court held that race-based programs, state or federal, are constitutional only if they further a *compelling* governmental objective and only if they are the least intrusive means of accomplishing that objective. Following *Adarand*, FCC chairman Reed Hundt said the agency intended to keep its minority preference policy and would justify it under the Court's strict standard.

Soon the FCC's entire comparative process was eliminated. But when the new auction system was adopted, it included this special accommodation: In order to help ensure that small businesses and businesses owned by minority groups and women have a good opportunity to succeed in the auctions, the FCC will award "new entrant" bidding credits to applicants with no, or few, media properties. Applicants with no controlling interests in other broadcast, cable, or daily newspaper properties will receive a 35 percent bidding credit. If such an applicant makes a winning bid of \$1 million, for example, the applicant will actually pay a reduced amount of \$650,000 to the U.S. Treasury. Applicants with no more than three existing media properties will receive a bidding credit of 25 percent. It remains to be seen whether this new system will meet the FCC's diversity goals and whether it will survive legal scrutiny.

## LICENSE RENEWALS

Broadcast licenses are awarded for a specified term of years, not in perpetuity. Under the Telecommunications Act of 1996, Congress extended license terms to a maximum of eight years for both television and radio. When the license term expires, the licensee must apply for renewal. Like the application for an initial license, the renewal process can be complicated by community opposition. Again, the FCC is authorized to grant renewals only "if the Commission finds that the public interest, convenience, and necessity would be served thereby."<sup>25</sup>

Though the grant of an initial license does not create a vested property right in the frequency, station owners may nevertheless invest millions of dollars in capital in their operations. Therefore, a decision to deny renewal is potentially a decision of great financial ramifications. The threat of nonrenewal is real, but in practice nonrenewals are statistically rare.

### ***The Renewal Process***

The basic procedure for broadcast license renewal was drastically streamlined in the early 1980s as part of the FCC's push toward partial deregulation. Most notably the FCC eliminated much of the paperwork previously imposed on broadcasters at renewal time—lengthy forms that had been used to document a station's performance. It moved to a five-question renewal application form that became known as postcard renewal. And more recently, the FCC's goal is to eliminate paper altogether with an online system. Nonetheless, license renewal is not necessarily a quick, slam-dunk process.

The renewal application must be filed at the FCC four months before expiration of the license. In addition, the stations must make a series of announcements over the air, beginning six months before the expiration of their licenses, to advise viewers or listeners that the station's license will soon expire and that comments regarding the renewal may be filed with the FCC by a particular date. Members of the public may register informal objections to the renewal or they may file a formal petition to deny the application.

An item of particular importance during renewal time is a station's **public inspection file**, which contains a copy of the renewal application and various other documents mandated by law.<sup>26</sup> The public file must be available for inspection at the station's offices during regular business hours throughout the term of the license. (Exhibit 9.2 shows a list of required documents.)

### ***Grounds for Nonrenewal***

The FCC does not conduct a full investigation into the performance of every licensee who applies for renewal. Instead, the agency usually depends on public comment to draw its attention to a licensee who might not deserve renewal.

The FCC may deny renewal for a variety of reasons unrelated to the licensee's programming content. Among the more likely reasons for nonrenewal are failure to follow the renewal application procedures; lying to the FCC (on application forms or in required reports, for example); fraudulent behavior in the billing of advertisers or in the operation of consumer contests or promotions; unauthorized transfer of the license; or some other development that would run afoul of the basic requirements discussed previously. Often a combination of such problems leads to nonrenewal. The Telecommunications Act of 1996 (summarized in Exhibit 9.3) specifies that renewal applications shall be granted if the station has served the public interest, if there have been no serious violations of

## EXHIBIT 9.2 The Public Inspection File

The FCC requires all TV and radio stations to maintain a local public inspection file at their main studios, available for viewing during regular business hours. The file also may be electronic, available to view on a studio computer terminal or on a website. Stations must keep the following documents in the file:

- A copy of the current FCC broadcast license
- Applications filed with the FCC (such as a renewal application)
- Signal contour maps
- The current ownership report, listing owners' names
- Any FCC materials relating to an investigation
- A political file, documenting time requested by and provided to candidates
- Annual employment reports, documenting efforts to recruit minorities
- Copies of recent written comments from the public
- An issues/programs list of programming that discusses specific local issues
- Children's Television Act reports on programming and commercial limits

the Communications Act or FCC rules, and if no other violations of FCC rules suggest a pattern of abuse.<sup>27</sup>

Programming content by itself rarely is grounds for nonrenewal. (And if it were, serious First Amendment questions might be raised.) But objectionable programming may well cost a station its license when coupled with grossly negligent management or with efforts to hide information from the FCC. For example, in one case the FCC informed a radio station at renewal time that listeners had complained of vulgar, indecent programs on the station and that the FCC had obtained tapes of the programs. The FCC invited the licensee to respond to the allegations. The owner responded at that time, and again at a hearing, that he had not been aware of the vulgar programs and that upon first learning of the problem from the FCC he had fired the employee responsible. However, evidence showed that numerous complaints had indeed been made directly to the owner prior to the FCC investigation. The FCC denied the renewal, not on the ground that the programming was illegal, but solely on the ground that the owner had lied to the FCC: "The licensee's misrepresentations and false statements, *in and of themselves*, constitute grounds for denial," wrote the commission. The denial was upheld by the Court of Appeals.<sup>28</sup>

In 1978 the commission denied renewal to a campus radio station at the University of Pennsylvania. For many months listeners had complained that programming on the student-run station was laced with obscenity. Complaints also were made about technical violations and about the conduct of students at the station. Yet the university, which held the license, took few steps to cure the problems at its station until after the FCC began a formal investigation at renewal

time. The commission denied renewal solely on the ground that the university licensee had abdicated managerial control over its own station.<sup>29</sup>

Even when a licensee has indeed performed irresponsibly or violated FCC rules, the commission is likely to employ a form of punishment less severe than nonrenewal. One popular form of punishment is to renew for a short term, such as two years. The FCC is also authorized in the Communications Act to assess fines—called forfeitures—against stations that violate specific FCC rules. Forfeitures can be imposed at renewal time or at any other time during the operation of the station.

### ***Renewal Expectancy***

Historically, as a broadcast license approached its expiration date, a new applicant could try to wrest the frequency away from the current licensee. A new applicant who met the basic qualifications could force a comparative hearing similar to the one described under “Competing Applications” previously for initial licenses; the same factors would be weighed to determine which applicant would best serve the public interest. But a comparative renewal proceeding included one additional consideration: Should the current licensee be accorded any degree of preference over the challengers?

Public interest reasons do exist for giving some comparative advantage—called a **renewal expectancy**—to the current licensee. For one, renewals provide greater certainty of performance, as opposed to regularly awarding licenses to challengers who might or might not live up to their paper proposals. The current licensee has an established track record and, even if this record is not outstanding, it may be wiser to renew the license than to turn the frequency over to a novice applicant. Second, renewals foster stability in industry ownership—stability that may be highly important to employees and investors. Finally, and perhaps most important, a likelihood of renewal encourages licensees to invest heavily in their stations, just as the owners of other kinds of businesses invest in their enterprises to improve performance over the long term.

In light of these considerations, the FCC for decades offered the possibility of a renewal expectancy to incumbent broadcasters embroiled in a comparative renewal proceeding. The renewal expectancy was one of several factors weighed in the comparative process. The better the broadcaster’s record in terms of serving the public interest, the greater the weight of the renewal expectancy.

In the Telecommunications Act of 1996, however, Congress eliminated comparative renewal proceedings. Instead, the FCC is directed to first decide whether an existing station’s license deserves to be renewed. If the answer is no, only then may the FCC open the frequency to new applications. This “two-step” approach to renewals means renewal is a near-certainty for broadcasters, as long as they do not neglect their public interest obligations. They must still demonstrate compliance with FCC rules that are directly grounded in public service philosophy, such

as the children's programming requirement for TV (discussed in Chapter 10) and the requirement of an EEO hiring process.

## TRANSFER OF LICENSES

Just like other businesses, commercial broadcast stations can accumulate substantial monetary value in their physical assets and consumer goodwill. When a station owner decides to no longer operate the station, the owner naturally will seek to sell the station during a license term and obtain full value for the business. It would make little sense to let the license expire and then attempt to sell the broadcast facility. Owners instead wish to sell a station that is an ongoing, licensed enterprise.

But it makes equally little sense for the government to operate a licensing scheme based on public interest standards and then allow the licenses to be transferred at will. Therefore, the Communications Act requires that all license transfers must first be approved by the FCC, based on a finding that the transfer would serve “the public interest, convenience, and necessity.”<sup>30</sup>

It is the responsibility of the station purchaser to file a transfer application with the FCC prior to closing the deal with the licensee. The FCC then gives public notice of the application on its Internet home page and allows a thirty-day comment period. In most cases the transfer (technically called an assignment of the license) is approved shortly thereafter, unless serious questions are raised through informal public complaints or in formal petitions to deny the application. A similar application and public comment process is followed when a station owned in corporate form undergoes a major stock transfer (technically called a transfer of control).

A burning legal issue some decades ago was whether listeners and viewers could force the FCC to consider their objections to proposed changes in entertainment programming formats before approving license transfers. The FCC's position was that the choice of entertainment formats should be left entirely to the judgment of the licensee and that market forces could be relied upon to promote enough diversity in programming to serve the public interest. But the public was angered in some locales where new owners arrived and eliminated an existing format, such as classical music, from the service area. In 1981 the Supreme Court sided with the FCC in *FCC v. WNCN Listeners Guild*. The Court concluded that the FCC was acting reasonably and within its legal mandate from Congress when it determined that “the market, although imperfect, would serve the public interest as well or better by responding quickly to changing preferences and by inviting experimentation with new types of programming.”<sup>31</sup> Furthermore, the Court concluded that the FCC's policy did not conflict with the First Amendment rights of listeners. Referring to its earlier decision in *Red Lion*, the Court wrote: “Although observing that the interests of the people as a whole were promoted by debate

of public issues on the radio, we did not imply that the First Amendment grants individual listeners the right to have the Commission review the abandonment of their favorite entertainment programs.”

## OWNERSHIP LIMITATIONS

Congress and the FCC have long advocated that the public interest is served by assigning the spectrum to many different broadcasters, rather than allowing media ownership to concentrate in the hands of a few. The underlying assumption that diversity in station owners equates to greater diversity in programming is challenged by some industry experts who say that market preferences ultimately determine the nature of programming, not the individual proclivities of media owners. Nevertheless, the FCC traditionally has adhered to the philosophy that new owners should be encouraged to enter the broadcast field and that no one individual or corporation should be allowed to amass unlimited numbers of broadcast licenses.

Congress and the FCC have for many decades set limits on media ownership. At first blush, this sounds simple enough. In reality, determining the various limits on local and national media concentration has been a constant, litigious tug of war. Not only is the notion of capping media ownership laced with First Amendment implications, but determining exactly where to draw the lines amid vacillating political climates, changing economic conditions, and advancing media technology has proved legally confounding.

The deregulation-minded FCC of the 1980s and early 1990s sought to relax or eliminate many of the traditional ownership limits, believing they were no longer necessary to ensure a multitude of broadcast voices in a market brimming with new media alternatives. But the FCC could only go so far because congressional leaders and consumer and minority groups at the time generally favored keeping the restrictions in place.

By the 1990s the prevailing philosophy in Congress had shifted toward further deregulation, and it relaxed some of the ownership limits with the Telecommunications Act of 1996 (see Exhibit 9.3 for a summary of the act). Furthermore, section 202(h) of the act appeared to target the ownership limits for even further rollback by requiring the FCC to review the rules every two years and to repeal or modify any regulation that could no longer be shown necessary to serve the public interest.

Even the relaxed ownership limits were challenged by broadcast companies pushing for further deregulation. And the Court of Appeals for the D.C. Circuit, interpreting the directive of the Telecommunications Act of 1996, held that section 202(h) creates a presumption in favor of rolling back the rules unless the FCC produces a solid factual record to demonstrate the value of a rule. (Previously the courts gave more deference to the FCC and would generally uphold ownership

## EXHIBIT 9.3 *The Telecommunications Act of 1996*

The Telecommunications Act of 1996 was the most sweeping revision of communications law since the Communications Act of 1934. Following are the most significant provisions for broadcasters and cable operators:

### Ownership Limits

- Repealed all limits on the number of radio or television stations one person or entity may own nationwide
- Increased the national audience reach limitation for TV station owners to 35 percent (formerly 25 percent)
- Raised the cap on the number of radio stations a party may own in one market (formerly 3 to 6, now 5 to 8, depending on size of the market)

### Licensing

- Authorized television and radio license terms of 8 years (up from 5 and 7 years, respectively)
- Eliminated comparative renewal proceedings for broadcast licensees

### Competition

- Repealed most price caps on cable operators, effective March 1999—or sooner if a cable operator faces “effective competition”
- Repealed regulations that had prevented telephone companies from offering video programming services, thus opening the door to direct telco–cable competition

### TV Violence

- Required TV industry to develop a ratings system for programming that contains sexual, violent, or other objectionable material
- Required that new TV sets, beginning in 1997, include V-chip technology to allow blocking of objectionable programming

rules if they simply appeared rationally related to their stated purposes.) In 2002 the D.C. Circuit, in two separate cases, ruled against the FCC on three of its ownership rules. It vacated a cable/broadcast cross-ownership restriction, saying the FCC failed to demonstrate it was “necessary” to safeguard competition, and it remanded the national and local TV ownership limits back to the FCC for further justification.<sup>32</sup>

In 2003, following the commission’s biennial review of ownership limits and partly in response to the D.C. Circuit rulings, the FCC announced a sweeping, highly controversial overhaul of its rules. With the commission itself divided 3–2 along Republican-led party lines, the FCC voted to substantially liberalize some of the ownership restrictions—as desired by large media companies. But the changes could not be implemented. Numerous consumer organizations and small broadcast companies, concerned about further media consolidation, promptly filed lawsuits claiming the FCC’s new, relaxed rules were illegally arbitrary. The lawsuits in the various federal circuits were consolidated and assigned to

the Court of Appeals for the Third Circuit—not to the D.C. Circuit that typically handles appeals of FCC rulings.

In *Prometheus Radio Project v. FCC*, the divided court in 2004 ruled that in the revamped rules the commission “has not sufficiently justified its particular chosen numerical limits” for station ownership.<sup>33</sup> Accordingly, the ambitious deregulatory package was remanded to the FCC for further consideration and justification. Congress, too, was deeply divided over the issue politically. Some responded to the FCC’s 2003 deregulatory overhaul by vowing to stand up to media conglomerates and push legislation that would retain previous ownership limits. Other members of Congress remained convinced that government should not impede natural marketplace development.

For years the FCC appeared to be frozen, and the nation’s media companies—and students of media law—were left entirely uncertain of what will happen next in this big-stakes battle. Finally, after completing its required biannual review of ownership regulations in December 2007, the FCC responded to the *Prometheus* ruling by proposing a more modest relaxation of its newspaper/broadcast cross-ownership ban and by leaving all other ownership limits as they were. The new cross-ownership regulation was promptly attacked in court by some who believed it remained too restrictive and by others who believed the ban should remain. Again the rule change was blocked.

As of 2009, these are the FCC’s six broadcast ownership rules and the status of each.

**Local Radio Multiple Ownership<sup>34</sup>** The FCC began limiting local radio ownership in 1938, and it first adopted a formal rule on the subject in the 1940s. For many years, the rule prohibited any one licensee from obtaining more than one AM station and one FM station in a market. In 1992 the FCC relaxed its local radio ownership limits and permitted common ownership of three to six radio stations per market, depending on the market size. The Telecommunications Act of 1996 further extended the limit to five to eight radio stations per market, depending on market size. In this tiered market approach, FCC rules allow the maximum eight stations per owner in markets with forty-five or more commercial radio stations.

**Local TV Multiple Ownership<sup>35</sup>** In 1999 the FCC also revised the local ownership limits for television. The rule permits common ownership of two TV stations in the same market area if (1) at least one is not among the four highest rated stations in the market and (2) at least eight full-power independent TV stations will remain in the market after the merger. The rule also allows common ownership of two stations in a market if a station is failing financially and a same-market licensee is the only available buyer. In 2002 the federal Court of Appeals for the D.C. Circuit remanded this rule to the FCC for further justification of the



eight-station criterion. In 2003 the FCC proposed new rules allowing up to three stations in large markets. But in 2004 the Third Circuit remanded to the FCC to justify the increase.

**Local Radio/TV Cross-Ownership<sup>36</sup>** In its original form, this rule limited a licensee to one VHF television station or one AM-FM radio combination within a single market. When this one-to-a-market rule was adopted in 1970, it applied prospectively only; licensees who already owned so-called radio/TV duopolies were allowed to keep them. Also, the FCC was inclined to grant waivers of the rule in large markets already served by thirty or more broadcast voices.

The rule was relaxed in 1999 to allow combined ownership of up to two TV stations and six radio stations or one TV station and seven radio stations in the largest markets, where at least twenty independent media voices would remain. In 2003 the FCC proposed a new, single set of relaxed limits for this rule and the newspaper/broadcast cross-ownership rule, but in *Prometheus* the particular limits were remanded to the FCC for further justification.

**Newspaper/Broadcast Cross-Ownership<sup>37</sup>** This rule prohibits granting a radio or television license to an applicant who owns a daily newspaper serving the same market. The rationale behind this rule is that ownership of a newspaper and, say, a TV station in the same community vests too much journalistic power in a single owner. The rule was applied prospectively only; newspaper/broadcast combinations in existence prior to 1975 were allowed to continue without requiring divestiture. This cross-ownership rule was not modified by the 1996 act. The FCC in 2003 and again in 2007 sought to relax the ban, but the modifications have been blocked by the courts.

**National TV Multiple Ownership<sup>38</sup>** The foregoing rules limit ownership within a given market area. But the FCC had for several decades also limited the total number of stations that could be owned nationwide. In 1953 the commission adopted an ownership limit of seven AM radio stations, seven FM stations, and seven TV stations. The 7-7-7 rule was immediately challenged in court as arbitrary, but the Supreme Court upheld the commission.<sup>39</sup>

In 1984 the FCC expanded the national multiple ownership limits to 12-12-12, and then in 1992 the commission raised the national radio ownership limits to thirty AM stations and thirty FM. Relaxation of the limits was warranted, the commission believed, because with thousands of different TV and radio licensees in the country, it had become less necessary for the government to ensure broadcast diversity through regulation. Furthermore, the FCC hoped the relaxed limits would help attract new investors to an economically ailing radio industry. The commission's action was sharply criticized, however, by minority broadcasters and

some members of Congress who saw the action as too drastic and an undeserved concession to media conglomerates.

Despite the controversy, however, the Telecommunications Act of 1996 repealed all national ownership limits for radio, allowing one person or company to own an unlimited number. The act also repealed the twelve-station national cap for television, but left the following FCC rule in effect: No person or entity may control a group of TV stations with a combined audience reach exceeding 35 percent of U.S. households. In a 2002 decision, the federal Court of Appeals for the D.C. Circuit remanded this rule to the FCC for further evidence that the limit was not arbitrary and was necessary to safeguard competition. In 2003 the FCC proposed increasing the reach limit to 45 percent. Congress responded with legislation setting the limit at 39 percent.

**Dual Network Ownership<sup>40</sup>** When originally adopted in the 1940s, the network rule simply prohibited any entity from operating more than a single radio network. Years later the concern about too much control over a market's broadcast content shifted from radio to television, of course. In the 1996 act, Congress directed the FCC to amend the rule. The resulting relaxed rule permits a TV station to affiliate with an entity that maintains more than one broadcast network, but not if the multiple networks are any combination of ABC, CBS, NBC, or Fox. So, the rule permits broadcast networks to provide multiple program streams simultaneously, but prohibits a merger of the big four networks.

Application of the FCC's various ownership limits is complicated by the fact that licensees often are not individuals but corporate enterprises with several or perhaps thousands of shareholders. How many shares must an investor own before that investor is considered a broadcast owner for purposes of these restrictions? The FCC's rules indicate that it is concerned only with "cognizable" ownership interests. This generally means an ownership level of at least 5 percent of the broadcast company.

## CONTRAST: CABLE FRANCHISING

Cable TV systems operate under less regulation than do broadcast stations. The FCC does exercise significant jurisdiction over cable systems, and some of the rules that apply to broadcasters also apply to cable operators. On the other hand, cable systems do not operate on the radio spectrum, are not subject to the Supreme Court's scarcity rationale for regulation, and are not licensed by the FCC as a condition of operation.

Rather than the FCC, the initial gatekeeper for cable operators is a municipal government. Cable companies must install their lines on utility poles or underground, typically beneath or adjacent to streets. Because cities and counties

control the rights-of-way to these facilities, local governments logically have assumed the task of franchising cable operators. In most cases a city in need of a cable system will consider competitive bids from several companies. Each bid will outline a specific proposal as to construction time, number of channels, subscriber rates, quality of equipment, and other service features. The city typically chooses one of the companies to construct and operate the system under an exclusive franchise for a set number of years, though some communities franchise competing cable systems. When the franchise expires, the cable company may apply to the city for renewal.

### ***National Audience Limits***

Cable systems have, however, been subject to federal limits on ownership. In the Cable Television Consumer Protection and Competition Act of 1992, Congress directed the FCC to establish two types of limits: “horizontal,” which limits the owner’s reach of operation, and “vertical,” which limits the cable operator’s integration with content providers. The FCC developed a horizontal rule that capped any one cable company’s subscribers at 30 percent of the national pay-TV audience. And the vertical rule was that no more than 40 percent of any cable company’s channel capacity could be dedicated to programming from companies affiliated with the cable system.<sup>41</sup>

But in 2001 the Court of Appeals for the D.C. Circuit threw both rules into doubt. In *Time Warner Entertainment Co. v. FCC*, the rules were challenged as unconstitutionally arbitrary. Because the regulations were not content-based, the court applied intermediate-level First Amendment scrutiny rather than the strictest level of scrutiny. Yet even under the less severe standard, the FCC must justify its regulations by showing that they burden no more speech than necessary to achieve a substantial government interest in promoting diversity of ideas and preserving competition, the court said. It held that, as to both rules, the FCC failed to meet the test. The court said, “We recognize that in drawing a numerical line an agency will ultimately indulge in some inescapable residue of arbitrariness. . . . But to pass even the arbitrary and capricious standard, the agency must at least reveal a rational connection between the facts found and the choice made.”<sup>42</sup>

In keeping with several other recent D.C. Circuit cases mentioned in this chapter, the court held that the FCC’s justifications for its line-drawing were unconvincing and contained too much conjecture about the alleged harms being combated. The court remanded the rules to the FCC for further research and justification.

Years passed. In 2005 the FCC finally announced it was reopening the cable ownership topic with the intent of crafting new rules. In 2007 the agency concluded it had sufficient evidence to justify, once again, adopting the 30-percent subscriber cap as a necessary measure to preserve meaningful competition in cable and an “open field” for video programmers. The nation’s largest cable operator, Comcast,

responded with a lawsuit charging that, once again, the FCC's regulation was unconstitutional. Comcast argued that in today's increasingly competitive environment of cable, satellite, and telephone-company video providers, there is even less justification for the 30-percent cap than there was in 2001.

In 2009 the D.C. Circuit again ruled against the FCC. In reinstituting the 30-percent cap, the Commission did not adequately consider the growing competitive impact of satellite delivery services, the court said. "In sum, the Commission has failed to demonstrate that allowing a cable operator to serve more than 30% of all cable subscribers would threaten to reduce either competition or diversity in programming."<sup>43</sup> Because the FCC had twice failed to justify the cap, and because Comcast's First Amendment right to communicate was hanging in the balance, the court this time vacated the 30-percent rule altogether rather than remanding to the Commission for another try.

## EEO RULES

The FCC has maintained **equal employment opportunity (EEO) rules** for broadcasters since 1969 and more recently for cable and satellite TV operators as well. The rules prohibit discrimination in hiring, but in addition they require these media to take formal, proactive steps to ensure that women and members of minority groups have a fair chance of being employed. The rules therefore go beyond the many nondiscrimination laws to which employers are subject at the federal, state, and local levels (i.e., the Age Discrimination and Employment Act, the Equal Pay Act, and the Civil Rights Act of 1964). Here again, an assumption is that a more diverse staff will fuel more diverse viewpoints on the air.

The commission's EEO rules first hit a legal snag in 1998. A Lutheran church operated two Missouri radio stations that aired music and religious programming. Both stations were housed on church property and helped carry out the church's religious mission. After receiving the stations' license renewal applications, the FCC requested more information about their EEO efforts. Also, the NAACP filed a petition to deny the renewals, contending that the church's EEO program was deficient. The church answered that its low percentage of minority employees was due to its hiring criteria: "knowledge of Lutheran doctrine" and "classical music training." Further, little outside recruiting was done because employees were drawn from the church's own seminary. Therefore, the station's minority employee percentage did not come close to matching the percentage of minorities in the local market – a target of the EEO rules at that time.

The FCC held that many positions at the station, such as secretaries and engineers, were not connected to espousing religion on the air and that the stations violated EEO regulations by failing to recruit minorities at least for those off-air positions. The church challenged the FCC's ruling, arguing that the minority-recruiting rule violated the equal protection component of the Fifth Amendment.

In *Lutheran Church—Missouri Synod v. FCC*, the D.C. Circuit Court of Appeals began its analysis by noting that the EEO rules, as written at the time, required more than an outreach program. The rules actually instructed broadcasters to make race-conscious hiring decisions so that minorities employed at a station would not be “underrepresented.” Because the rules were attempting to influence ultimate decisions on the basis of race, the court applied a strict-scrutiny test under the *Adarand* precedent, discussed previously. In its stinging opinion, the court criticized much about the FCC’s logic and application of the regulations. But most important, the court was not convinced of a compelling justification for the race-based rules:

The Commission has unequivocally stated that its EEO regulations rest solely on its desire to foster “diverse” programming content. . . . The Commission never defines exactly what it means by “diverse programming.” The government’s formulation of the interest seems too abstract to be meaningful. . . . We do not mean to suggest that race has no correlation with a person’s tastes or opinions. We doubt, however, that the Constitution permits the government to take account of racially based differences, much less encourage them. One might well think such an approach antithetical to our democracy. Indeed, its danger is poignantly illustrated by this case. It will be recalled that one of the NAACP’s primary concerns was its belief that the Church had stereotyped blacks as uninterested in classical music.<sup>44</sup>

The FCC’s ruling against the church was therefore reversed, and the EEO regulation invalidated.

The *Lutheran Church* case did not cause the FCC to back away from EEO rules, however. In 2000 the commission adopted new EEO rules intended to correct the constitutional defects identified by the appeals court. The new rules focused on outreach efforts. Broadcasters had the flexibility to design their own outreach programs, such as sending vacancy announcements to recruitment organizations, participating in minority job fairs, and establishing internship programs. Broadcasters still had to file employment profile data with the FCC, but the commission would not use the data to assess EEO compliance, to make licensing decisions, or to otherwise second-guess broadcasters’ ultimate hiring decisions. The new rules also permitted religious broadcasters to establish religious belief or affiliation as a job qualification for all station employees.

But fifty state broadcasters’ associations promptly challenged the new EEO rules, arguing that they still violated constitutional equal protection principles by pressuring stations to give preferential treatment to women and minorities in the hiring process. The Court of Appeals agreed in *MD/DC/DE Broadcasters Assoc. v. FCC*. Though the revised EEO rules allowed a licensee to design its own outreach programs, they still required that the race and gender of all job applicants be reported back to the FCC. The natural effect of this requirement was official coercion to hire representative numbers of people based on race, the court held

in its 2001 decision. As a race-based law, it was subjected to the strict scrutiny test, and failed. The government may well have a compelling interest in preventing discrimination, the court said. But the requirement was not narrowly tailored to serve that interest because the racial data reports required of licensees “are not probative on the question of a licensee’s efforts to achieve . . . broad outreach” or nondiscrimination in hiring, the court said.<sup>45</sup> Therefore, the EEO regulations were again invalidated.

In 2002 the FCC made its third attempt at EEO rules for the electronic media. The latest version requires media to widely disseminate notices of all full-time job vacancies; provide vacancy information to employment recruitment organizations that request it; and conduct two to four long-term recruitment initiatives (depending on station size), such as job fairs and internship programs designed to help educate the public about industry employment opportunities. The media are required to document their prospect referral sources and their publication of vacancy listing advertisements in order to evidence broad-based recruiting. The documentation must be placed in the media’s public inspection files, which are kept at their main studios, and the FCC will promote compliance by reviewing the record at license renewal time or, for cable systems, every five years. Random audits may also be conducted. The latest EEO rules do not, however, require demographic data on actual interviewees or hires, and in that respect the regulations are intended to be race and gender neutral, with no hiring quotas.<sup>46</sup>

Twice in 2008 the FCC conducted random EEO audit sweeps of TV stations, radio stations, and cable companies. The audits resulted in several fine notifications in 2008 and 2009, ranging in amount from \$3,000 to \$20,000.

## Summary Points

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**The broadcast media are subject to far greater regulation** than the print media, and the First Amendment permits this under the justification of spectrum scarcity, as articulated most elaborately by the Supreme Court in the case of *Red Lion Broadcasting v. FCC*.

**The federal government has preempted** almost all aspects of broadcast regulation through the Communications Act of 1934. In contrast, cable TV is regulated by both the federal government and the states, primarily through cities and counties that franchise local cable operators.

**The chief regulatory agency for most electronic media** is the Federal Communications Commission, which enacts detailed regulations and adjudicates disputes. Since the late 1970s, the FCC has been like a pendulum, swinging between periods of regulation and deregulation. Also, some restrictions on the electronic media come directly from statutes enacted by Congress.

The ultimate power over broadcasting is the government's licensing power, controlled by the FCC. The licensing process has been revised dramatically in recent years to include an auction process for commercial stations.

**The broadcast media are subject** to various ownership limits intended to ensure that consumers are served by multiple media voices and diversity in programming. These rules are controversial and often change, however. Some were modified or eliminated under the Telecommunications Act of 1996, and the FCC is required to justify its ownership rules every two years.

**The FCC's equal employment opportunity rules** for broadcasting and cable have also been controversial. The commission recently announced revised EEO rules in response to court decisions that found prior rules unconstitutional.

## Discussion Questions

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1. The *Red Lion* decision seems to rest entirely on the notion of spectrum scarcity. Specifically, what technological advances have been employed over the last two decades to call into question the continued validity of the scarcity rationale? Do you think these advances are *legally* sufficient to warrant a reconsideration of the *Red Lion* principle?
2. Suppose the Supreme Court took the drastic step of overturning *Red Lion* and declaring invalid the current licensing scheme for broadcast. What kind of legal rules could be applied instead to ensure orderly use of frequencies and sufficient certainty to prompt capital investment in stations?
3. The legal restraints on broadcast station ownership have proved highly controversial. Do you think the FCC makes a valid assumption that greater diversity of broadcast owners will equate to greater diversity in programming? Might another rationale better justify caps on ownership by a single individual or corporation?
4. The severe economic downturn of 2008 and 2009 led many media corporations to slash budgets, divest properties, and lay off employees, in some cases making the FCC's ownership limits a moot point. But are there advantages to having at least a handful of very large media conglomerates in the nation? (Recall from earlier chapters that many of the most important First Amendment cases were initiated by large media companies with the substantial resources necessary to fight the government in court.)
5. In striking down the FCC's 30-percent national subscriber cap on cable companies, the federal appellate court in 2009 said the agency failed to show the rule was necessary to protect competitiveness in a marketplace of growing satellite video options. Discuss this further, from the financial perspective of a small production company. If the nation's largest cable company

turns down a proposed TV show, does the production company still have *viable* options for reaching a large national audience? Or could that single cable company's denial create a programming bottleneck?

6. Apart from the constitutional issues, media have criticized the Federal Communications Commission's EEO requirements as overly burdensome paperwork and bureaucracy—especially for small broadcasters with only a handful of employees. But some consumer groups say that the electronic media, with their special power to influence, have an obligation to reflect the makeup of their communities. Do you think the FCC's current EEO rules have struck a workable balance? What do broadcasters in your community think?

## Key Terms

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ascertainment	public inspection file
band allotment	radio spectrum
broadcasting	renewal expectancy
channel assignment	scarcity rationale
comparative proceeding	spectrum allocation
equal employment opportunity (EEO)	



# Electronic Media Content



*After completing this chapter, you should*

- **Possess** a working knowledge of the political broadcasting rules and understand why they can be confusing and burdensome to broadcasters.
- **Understand** broadcasters' special legal duties concerning children's television.
- **Know** how to spot possible violations of other content controls enforced by the Federal Communications Commission.
- **Appreciate** the First Amendment tension arising from differing content regulation of broadcast stations versus cable TV and understand how those media are treated differently under the law.

## BROADCASTERS AND POLITICAL SPEECH

As we saw in Chapter 9, tremendous constitutional and regulatory implications derive from the view that broadcast airwaves are *public* property, that they are uniquely *limited*, and that they must be *government-managed*. The spectrum scarcity rationale, articulated by the Supreme Court in *National Broadcasting Co. v.*

## Hypothetical

### Air Time for a Crackpot?

Suppose you are the station manager for a television station in a small city. The owner lives nearby but rarely visits the station. She gives you wide latitude to make the day-to-day decisions at the station, with the simple directive that you “don’t do anything that could cost us our license.”

It’s an election year, and that has brought you some extra headaches at the station. In the interest of public service, you scheduled a live debate at your studio between the two major-party candidates for a seat in the state legislature. You purposely declined to invite the third candidate, who is running as an independent and lags well behind in the polls. Frankly, you believe the independent candidate is a crackpot who would detract from the quality of the debate, which is scheduled ten days before the general election.

Then the third candidate phones you and demands to be included. He says federal law requires you to include all candidates in the debate. And if you exclude him, he says, he will have a right to free response time on your station. Is he right about this? While you’re mulling this over, the candidate also advises you that he wants to buy three sixty-second commercial spots on your station, to air during prime time two days before the election. You would prefer to simply decline. Or you would like to quote him rates equivalent to the very highest you charge any advertiser. Is it your business and First Amendment prerogative to make these decisions, or does the law intervene here?

Meanwhile, a local viewer has sent a nasty letter to the station owner, complaining that the station is not meeting its obligations to children. The viewer said she has examined the station’s public file and that you are not providing enough programming to meet the educational needs of young viewers. In the file you specifically noted that you are running the cartoon show *The Flintstones* to teach youngsters lessons about family relationships, and rerunning the old sitcom *Gilligan’s Island* to help kids learn about survival skills. Isn’t this good enough? Don’t you have a First Amendment right to make these judgments?

*United States* and in *Red Lion Broadcasting v. FCC*, cleared the path for a licensing scheme and even direct content control that would be otherwise antithetical to the First Amendment. Once government was in the house, so to speak, Congress and the FCC felt obliged to regulate for many reasons: to ensure fairness, equalize voices, protect children, inform consumers, and avoid panic, to name a few. Under the scarcity-rationale model, after all, broadcast licensees aren’t owners of a private medium but are rather stewards of a unique public forum.

Spectrum scarcity is still the chief, underlying legal justification for bypassing the usual First Amendment scrutiny when content regulations are aimed at broadcast. From the *consumer's* perspective, cable TV and other nonbroadcast radio and TV delivery services look virtually the same as over-the-air broadcast. Because these services do not use space on the radio spectrum, content regulation of these other electronic media is not so easily accomplished, as we will see later in the chapter. But first, we will look at the content controls that broadcasters must deal with almost daily, starting with the long-established efforts to moderate political dialog.

When the federal government began regulating radio in the late 1920s, its predominant task was to bring order to the cluttered broadcast spectrum and resolve conflicts between interfering broadcasters. The initial policy simply favored the first broadcaster to use the frequency. Soon, however, the Federal Radio Commission realized that considerable disparity existed in the quality of service broadcasters provided. The commission modified its policy by announcing that, in cases of substantial difference in quality, “the claim of priority must give way to the superior service.”<sup>1</sup> A decision might be reached in favor of one station with “meritorious programs” and against another with “limited public service” programming.<sup>2</sup> Thus, regulation of broadcast content was born.

The most complicated of today’s content regulations—and potentially the most abrasive to free-speech principles—are those pertaining to political broadcasting. Political speech is in no way prohibited, but broadcasters are required to give certain candidates access to their broadcast facilities, to treat all political candidates equally, and to give candidates preferential advertising rates at certain times of the year. The basic requirements have been in place for many years and are statutory. But FCC rules and policies play a major role in determining exactly how the statutory provisions are interpreted and enforced, and these rules are, of course, subject to change.

## EQUAL OPPORTUNITIES RULE

Section 315(a) of the Communications Act provides that whenever a legally qualified candidate for public office uses broadcast time, the station must afford equal opportunity to all other candidates in the race. This is known as the **equal opportunities rule**, sometimes also called the equal time rule. The basic language of the statute, which has changed only slightly since it was originally part of the Radio Act of 1927, is as follows:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material

broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate.

The key antecedent to a broadcaster's obligations under the rule is a use of broadcast time by a declared candidate during a political campaign. Use of time by a candidate triggers the broadcaster's obligations to provide equal opportunities. Therefore, it is important for broadcasters to recognize when a candidate has "used" broadcast time in the eyes of the FCC.

The FCC defines *use* as any positive appearance by a candidate, via voice or picture, that is identifiable to the broadcast audience. The typical campaign commercial, then, would qualify as broadcast use by a candidate. An appearance on a TV variety show or a charity telethon also would be considered a use in most cases. So would a product commercial or public service announcement featuring the candidate. There is no requirement that the appearance contain a political message; nonpolitical appearances are still uses if they occur after the candidacy has been declared.

The importance of understanding these principles is illustrated by the following example: In 2002 a number of sister radio stations in Ohio aired thirty-second public service announcements featuring Ohio Treasurer and candidate Joe Deters promoting his office's free Women & Money investment seminars. When the stations realized the equal opportunities implications, the spots were pulled. But by that time, the station was obligated to offer Deters's opponent in the statewide election seventy ads in Cleveland and a similar number in Columbus. And because the Deters announcements were aired at no charge as part of the radio company's sponsorship of the Women & Money program, the opponent's spots also were free.<sup>3</sup>

An interesting problem arose when former screen actor Ronald Reagan began campaigning for the presidency in the 1970s. Broadcast stations around the country could hardly resist airing some of Reagan's old films, such as the classic *Bedtime for Bonzo*, featuring Reagan along with a chimpanzee. But would broadcasting those films amount to a use of air time by a candidate and thus raise equal opportunity obligations by the station? In 1976 the FCC ruled that showing the movies would indeed amount to a use, noting that even nonpolitical appearances can be highly beneficial for a candidate, to the detriment of other candidates who may be struggling to become better known.<sup>4</sup> In 1992 the FCC narrowed its definition of use to require that the appearances be controlled, approved, or sponsored by the candidate. But this gave considerable political discretion to broadcasters, and the FCC returned to its original definition in 1994.

### ***Exemption for News***

The definition of broadcast "use" is subject to some very important statutory exemptions, however, that Congress added in 1959. In the interest of encouraging

maximum news coverage and respecting the journalistic judgment of broadcast stations, the statute provides that candidate appearances shall *not* be deemed a use of a broadcast station if they occur in any of the following:

1. Bona fide newscasts
2. Bona fide news interview programs
3. Bona fide news documentaries
4. On-the-spot coverage of bona fide news events, including political conventions and debates<sup>5</sup>

The term *bona fide* in this list refers to news coverage that is genuine and impartial, based on sincere journalistic judgment and not used to advance the candidacy of a particular individual. Without the news exemptions, broadcasters might shy away from covering legitimate political news for fear that it would create a flood of equal opportunity obligations. Such a reluctance to cover important news would be contrary to the public interest, of course, and contrary to the intent of the equal opportunities rule.

Determining whether a news exemption applies is not always easy, and broadcasters sometimes request declaratory rulings from the FCC before going ahead with programming plans. To determine whether a program qualifies as a bona fide news interview, for example, the FCC considers three factors: (1) whether the program is regularly scheduled; (2) whether the broadcaster, not the candidate, controls the program; and (3) whether the broadcaster's decisions on format and participants are based on reasonable, good-faith journalistic judgment. Using these criteria, the commission generally holds that TV talk shows are bona fide news interview shows.

In 1984 an interesting use question arose when William Branch, a TV news reporter in Sacramento, sought election to a nearby town council. Branch appeared in newscasts about three minutes per day on average. The station calculated that it would be required to provide thirty-three hours of free response time to Branch's opponents if he continued to work on air during the campaign. The station therefore told Branch he would need to take an unpaid leave of absence during his campaign. Branch sought a ruling that his continued appearance as a newscaster would not be considered a use of broadcast time. But in *Branch v. FCC*,<sup>6</sup> the Court of Appeals ruled otherwise. Branch had argued that his appearances did not trigger the equal opportunities rules because they were part of bona fide newscasts. But the court distinguished between coverage *of* a candidate and coverage *by* a candidate. Congress exempted coverage of legitimate news events, the court said, to protect a station's ability to exercise broad discretion in choosing which newsworthy events to present to the public. Sometimes an appearance of a candidate is itself a newsworthy item and thus deserves to be exempt. However, when a candidate simply covers a news event involving other people, the appearance is unrelated to the news content and therefore is not exempt.

In 2006 California governor Arnold Schwarzenegger, in the midst of his reelection campaign, was scheduled to appear on *The Tonight Show with Jay Leno* about one month before election day. When the Democratic challenger, Phil Angelides, learned of this, he asked to also appear on the NBC show. When the request was not met, the Angelides campaign filed an FCC complaint and requested equal time on eleven California TV stations that aired the show. The FCC ruled, however, that the Schwarzenegger appearance was an exempt, bona fide news interview. Though portions of the show might be pure entertainment, the interview clearly dealt with current newsworthy issues, the agency noted.<sup>7</sup>

### **Special Problem: Debates**

Political debates and news conferences have been particularly troublesome under the equal opportunities rule. In the early 1960s, the FCC interpreted the spot news exemption to apply only if the appearance of a candidate was incidental to the coverage of a separate news event. Candidates themselves could not be the event. This interpretation meant that televised political debates and press conferences were considered broadcast uses that required stations to provide equal time to any opposing candidates who did not appear in the original debate.

But in 1975 the commission overruled its earlier interpretation. Upon a closer examination of congressional intent, it decided that a debate was exempt if sponsored by an organization other than the candidates themselves or the broadcaster and if the broadcaster made a good-faith, journalistic judgment that the debate was newsworthy. Similarly, the commission decided that press conferences by candidates were exempt if broadcasters reasonably judged them to be newsworthy enough for spot coverage. Minor-party candidates appealed the FCC's rulings, but the Court of Appeals upheld the commission's altered interpretation of the Communications Act.<sup>8</sup>

In 1983 the commission went one step farther, ruling that even a debate sponsored by the broadcaster can qualify as bona fide spot news so long as the broadcaster has designed the format and invited candidates on a good-faith judgment of news value. The key is simply whether the broadcaster has arranged and covered the debate based on a good-faith judgment of newsworthiness. If so, the broadcast does not qualify as use by a candidate, and candidates excluded from the debate acquire no equal opportunity rights.<sup>9</sup>

Based on this ruling, how would you answer the question posed in this chapter's Hypothetical? Recall that you had arranged a debate at your station between the two leading candidates for office. Though a third, minor candidate demanded equal time, you would not have to meet that demand because you made a good-faith judgment that a debate between the two leading candidates alone was a bona fide news event.



### **Equal Opportunities Rule**

- Has a candidate for public office “used” a broadcast station?
  - Was there a positive appearance of the candidate, by voice or picture, recognizable to the audience?
  - Was the appearance in a context other than bona fide news programming?
- Has the station then afforded equal opportunity, upon request, to all other candidates for the same office?

### ***The Meaning of Equal Opportunity***

Nonexempt use of broadcast time by a political candidate automatically activates the equal opportunities rule. Section 315(a) of the Communications Act, as applied by the FCC, works as follows: After the initial use of broadcast time by a legally qualified candidate (Candidate A), any other legally qualified candidate in the same race (Candidates B and C) may demand equal opportunity to appear on the station. The demand must be made within seven days of the initial use by Candidate A. Broadcast stations are not required to directly notify campaign opponents each time a candidate makes use of the station’s air time. But stations must keep a detailed, public file of candidate uses.

*Equal opportunity* means precisely that. It means that Candidate B must be afforded an opportunity to reach essentially the same size audience as Candidate A, for the same length of time, at the same cost. If Candidate A purchased a sixty-second commercial at 2 A.M., the opponent must be given an opportunity to purchase sixty seconds in the wee morning hours at the same rate. If Candidate A’s appearance was free during prime time as part of an entertainment show, Candidate B has a right to the same number of minutes during prime time at no charge. The time slot need not be exactly the same, as long as the requesting candidate reaches a comparable audience. The broadcaster has discretion to determine precisely how its equal opportunity obligations will be met; a candidate does not have the right to demand access to a particular program, hour, or day.

Candidates B and C are not required to use their equal opportunity time to address the same matters raised in Candidate A’s initial appearance. In fact, the responding candidates may use the time in any way they choose, and section 315 warns that the broadcaster “shall have no power of censorship over the material broadcast under the provisions of this section.” This means that the broadcaster must stand aside and refrain from editing even those political uses that may contain vulgar or defamatory remarks. In light of this no-censorship mandate, it would seem logical that a broadcaster should not be subject to liability if the political use is indeed defamatory—and the Supreme Court has so ruled.<sup>10</sup> The candidates themselves are responsible for what they say on the air, however.

### **Zapple Doctrine**

Acting under the Communications Act's broad, public interest mandate, the FCC in 1970 adopted a policy that essentially extends the equal opportunities rule to the supporters of candidates. When a broadcaster sells or gives time to the supporters of one candidate, the supporters of the opponent are entitled to equal time on the air under what has come to be known as the quasi-equal opportunities rule or **Zapple doctrine**. This policy is not a section 315 requirement of the Communications Act, but rather a creation of the FCC under its authority to ensure fairness and promote the public interest on the airwaves. Just like the equal opportunities rule, though, the Zapple doctrine applies only during campaign periods, the response time isn't necessarily free, and bona fide news programming is exempt.<sup>11</sup> In practice, this doctrine is not a frequent headache for broadcasters.

### **CANDIDATE ACCESS**

To avoid the potentially onerous obligations of the equal opportunities rule, broadcasters may be tempted to refuse any access by candidates in the first place. Nothing in section 315 would prevent this. However, a companion section of the Communications Act, section 312(a)(7), was adopted by Congress in 1971. It specifies that a broadcast license may be revoked for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy." What this means is that—in regard to federal candidates—a broadcaster may not categorically exclude access or otherwise deny reasonable requests to purchase political time.

The Supreme Court interpreted the reasonable access requirement in *CBS, Inc. v. FCC*, a 1981 decision. Jimmy Carter's campaign for president had sought to purchase thirty minutes of prime time from each of the major TV networks in December 1979, just after Carter announced he would seek reelection. The networks refused on grounds that it was too early in the political season and that the requested access would disrupt their programming. But the FCC ruled that the networks, which also were broadcast licensees, had violated the reasonable access requirement. The Supreme Court agreed. Wrote Chief Justice Burger:

Broadcasters are free to deny the sale of air time prior to the commencement of a campaign, but once a campaign has begun, they must give reasonable good faith attention to access requests from "legally qualified" candidates for federal elective office. Such requests must be considered on an individual basis, and broadcasters are required to tailor their responses to accommodate, as much as reasonably possible, a candidate's stated purposes in seeking air time. In responding to access requests, however, broadcasters may also give weight to such factors as the amount of time previously sold to the candidate, the disruptive impact on



regular programming, and the likelihood of requests for time by rival candidates under the equal opportunities provision of §315(a). These considerations may not be invoked as pretexts for denying access; to justify a negative response, broadcasters must cite a realistic danger of substantial program disruption—perhaps caused by insufficient notice to allow adjustments in the schedule—or of an excessive number of equal time requests. . . . If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference. . . . But if broadcasters adopt “across-the-board policies” and do not attempt to respond to the individualized situation of a particular candidate, the Commission is not compelled to sustain their denial of access.<sup>12</sup>

The Court concluded that the networks had not adequately considered the president’s request on an individual basis.

In 1991 a legally qualified candidate for the New Hampshire Republican presidential primary, Michael Steven Levinson, requested three-hour blocks of free, prime-time programming from two noncommercial TV stations. The stations denied the request, and each offered five prime-time minutes instead. Levinson filed a complaint with the FCC, but the agency ruled that the stations’ actions were reasonable. The stations had cited two main reasons for their denial of the access request: First, the three-hour request would have a highly disruptive effect on each station’s programming. And second, with at least nineteen candidates in the race for the Republican nomination, the potential equal time requests under section 315 would be unduly burdensome.<sup>13</sup> (The reasonable access statute has since been amended to exempt noncommercial, educational stations from the requirement.)

The access requirement of section 312(a)(7) applies only to federal candidates—people vying for the U.S. House or Senate and candidates in presidential/vice-presidential races. State and local candidates have no similar right of access. If a station does sell time to a candidate for state or local office, however, the equal opportunities rule is applicable.

### **Advertising Rates**

One way to keep candidate use to a minimum, it might seem, would be to charge higher-than-usual advertising rates to candidates. The law, however, requires just the opposite. Section 315(b) of the Communications Act reads:

The charges made for the use of any broadcast station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

1. During the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in

- which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
2. At any other time, the charges made for comparable use of such station by other users thereof.

This means that during most of the year, stations must charge candidates no more than they would charge commercial advertisers for the same kind and frequency of advertising. During the 45- and 60-day periods preceding elections, however, candidates are entitled to an even better deal: They can be charged no more than the lowest unit rate enjoyed by a commercial advertiser during the same time slot.

For example, suppose that a TV station's usual ad rate for a thirty-second spot during prime time is \$200. Discounts are given to advertisers who buy with great frequency, however, and one commercial advertiser who bought the most spots is actually being charged \$125 per unit for those spots. Within the 45- or 60-day period prior to an election, a candidate wishing to buy a prime-time thirty-second spot could be charged no more than \$125—the lowest unit rate—even if the candidate purchases just a single spot. During other times of the year, the candidate could be charged no more than the \$200 that commercial advertisers normally would be charged for a single spot.

In practice, implementing the lowest unit rate requirement can be quite complicated. In 1990 the FCC sent inspectors out to thirty TV stations, unannounced, to conduct an audit of compliance with the political broadcasting rules. The agency found that at most of the stations candidates were paying more for commercials than were other advertisers. One reason for this, the FCC found, was that candidates were generally being sold nonpreemptible, fixed-time commercials. This is a different and more expensive class of advertisement than the preemptible commercials generally purchased by most other advertisers. Because the lowest unit rate requirement applies only to advertisements within the same class, the audited TV stations were not necessarily in violation. Nevertheless, the FCC was concerned that candidates were not being fully apprised of their options. In 1992 the agency issued new disclosure requirements. Every station now must give a written disclosure statement to any candidate inquiring about advertising. The statement should include a description of all available classes of time, the lowest unit charge for each class, and the privileges associated with each class.

The special ad rate provisions apply only to candidate uses of broadcast time. The lowest unit rate and comparable rate requirements of section 315 do not apply to other kinds of advertising that may have a political message, such as an interest group's ad in support of a particular ballot initiative or referendum.

### ***Pressing for Free Time***

In the late 1990s, pressure began building to make free air time available to candidates. Advertising costs had risen significantly, especially in the big media markets,

and the growing concern was that the costs of running a competitive campaign had become prohibitive for many potential candidates who would need broadcast time to become known to voters. By 1997 the president and many members of Congress had expressed support for some kind of free access provision, and the FCC chair at the time, Reed Hundt, publicly called upon the commission to launch a free-time initiative to promote more robust candidate access to the nation's airwaves. A year later his successor, William Kennard, vowed to launch a formal proceeding on free or reduced-rate airtime for candidates. In 2001 a nonprofit group, Alliance for Better Campaigns, distributed a report asserting that broadcasters were gouging candidates by selling them expensive, nonpreemptible spots, and it urged free access to improve public political discourse. Meanwhile, some Wall Street analysts estimated that political advertising expenditures had risen to a record of roughly \$1 billion nationwide for the year 2000 elections.

But neither Congress nor the FCC voted to actually mandate free access to the airwaves—a concept vehemently opposed by the broadcast industry. In 2001 the U.S. Senate did pass a campaign reform bill with the so-called Torricelli Amendment, which would have required TV stations to always offer candidates the very lowest ad rate and to also make the spots nonpreemptible. But the amendment was defeated in the House.

The free-airtime idea still is being considered by some at the FCC and in Congress, sometimes as part of the FCC's broader inquiry into "localism" and broadcast licensees' coverage of community issues. But by the time the 2008 federal election cycle came around, many broadcasters were facing tough economic times and decreasing ad revenues, and formal efforts to mandate free airtime had faded into the background.

## THE FAIRNESS DOCTRINE SAGA

Historically, the most controversial or omnipresent content controls that broadcasters faced were those constituting the **fairness doctrine**, which originated with the old Federal Radio Commission and was refined in the 1940s by the FCC, operating under its general mandate to supervise broadcasting in the public interest. The theory behind the doctrine was that the radio spectrum simply did not have enough room for every religious, political, or social school of thought to have its own separate station on the air. Therefore, it was the duty of each broadcast licensee to make sure that a full range of viewpoints was presented. Specifically, the fairness doctrine required that all broadcasters (1) devote a reasonable amount of their programming to controversial issues of public importance and (2) provide contrasting viewpoints on those issues.

The commission did not establish a rigid formula; equal time was not required, as it is for candidates under section 315. Rather each licensee was simply expected to act in good faith to cover issues and to air contrasting views. Nevertheless,

the fairness doctrine caused considerable problems for broadcasters and for the FCC. Audience complaints to the commission were numerous, and litigation was common, particularly under the second prong of the doctrine. Some broadcast observers claimed that the doctrine was stifling robust debate of the issues rather than encouraging it. Broadcasters were inclined to reduce controversial programming rather than be flooded with demands to air all contrasting views.

In 1987 the FCC formally abandoned the fairness doctrine. In its Syracuse Peace Council decision,<sup>14</sup> the commission eliminated the doctrine on several grounds. Most notably, the commission said that the doctrine discouraged rather than enhanced the coverage of controversial issues and that, given the many media voices in today's marketplace, the doctrine was probably an unconstitutional interference with the editorial discretion of broadcasters.

In the years 2007 to 2009 the fairness doctrine became a political lightning rod yet again. Some democrats in Congress, prompted in part by radio stations that devote most of their programming to right-wing talk format, said publicly that perhaps the fairness doctrine should be legislatively reinstated. Conservative talk-show hosts and religious broadcasters quickly condemned such comments as a back-door effort to silence their views, and in the early days of the Obama administration FCC nominees were grilled by Republican senators on their fairness-doctrine views. Despite the speculation and heated political posturing, however, any real prospect of bringing back the doctrine was highly remote.

### ***The Corollary Rules***

In 1967 the FCC had added to the main trunk of its fairness doctrine two corollary rules. These were the **personal attack rule** and the **political editorial rule**.

The personal attack rule was activated whenever a person or small group was subject to a character attack during broadcast presentations on public issues. Within one week the station had to notify the individuals who were attacked, send them tapes or transcripts of what was said, and offer a reasonable opportunity to respond on the air. Under the personal attack rule, the response time had to be offered free, even if the original attack was made by an individual who had purchased the air time. If the personal attack occurred during a network show, the individual affiliate nevertheless had to ensure that the obligations of the rule were met. The rule did not apply to personal attacks on foreign groups, attacks that occurred during bona fide newscasts, or attacks made by political candidates against other candidates.

The political editorial rule was activated when a station broadcast an editorial endorsing or opposing candidates for public office. The rule required that the candidates who were not endorsed be notified by the station and accorded reasonable opportunity to respond. Here again, the response time had to be offered free. Political editorials were in no way prohibited; stations simply had to provide notification and response time to the candidates who came out on the losing end of the editorial.

Interestingly, when the commission axed its fairness doctrine in 1987, it did not eliminate these corollary rules, which thus remained in full effect. On several occasions, broadcasters petitioned the FCC to vacate the rules, but the commission failed to act. The commissioners themselves were sharply divided over whether the rules were serving the public interest or unnecessarily hampering broadcasters. Years went by with the personal attack and political editorial rules technically on the books, but without a reaffirmation by the FCC.

Finally in 1999 the Court of Appeals for the D.C. Circuit instructed the FCC to justify its corollary rules, in light of its decision to abandon the fairness doctrine. The commission vowed to study the rules and report back to the court. But in late 2000 the court lost its patience. Saying the FCC had essentially ignored the court's 1999 order for expeditious action, the court in *Radio-Television News Directors Assoc. v. FCC* ordered the immediate repeal of the two rules. The rules had continued to "exist in a vacuum, unsupported by reasoning that would demonstrate to the court that they are in the public interest notwithstanding some interference with and some burdens on speech,"<sup>15</sup> the court wrote.

### **Remaining Fairness Enforcement**

Thus the FCC's formal fairness rules—a big part of broadcasting for many years—have all passed from the scene. The rules still have their backers, and they could be revived by Congress, or by the FCC if sufficiently justified. In 2008 and 2009 some members of Congress, reportedly concerned about conservative radio talk shows they saw as blatantly one-sided, talked openly about bring back the doctrine. But as of this writing, any chance of a fairness-doctrine revival looked dim.

Still, the FCC has the authority—and perhaps an obligation—to enforce basic notions of fairness under the broad public interest standard of the Communications Act. More than three decades ago, the FCC interpreted this standard to prohibit deliberate distortion of significant news events, for instance, and the courts have backed this policy.

In the mid-1990s CBS produced a *60 Minutes* segment titled "The Ugly Face of Freedom," about modern Ukraine. It angered many of Ukrainian heritage who thought the program was designed to suggest that all Ukrainians harbored negative attitudes toward Jews. Interviewer Morley Safer suggested that Ukrainians were "genetically anti-Semitic," for example, among other dubious statements, hyperbole, and questionable editing. CBS was deluged with complaint letters. And an American of Ukrainian ancestry petitioned the FCC to deny or set for hearing CBS's applications for two station licenses.

CBS argued that any investigation into the fairness of its news broadcasting would be a violation of free speech, and the FCC declined to hold a hearing, saying that the petitioner had failed to show sufficient evidence of intentional distortion to even warrant a review. But in *Serafyn v. FCC*,<sup>16</sup> the federal Court of Appeals disagreed.

The court began its 1998 opinion by noting that the FCC, under section 309 of the Communications Act, is allowed to grant a broadcast license only when it determines the license would serve the “public interest, convenience, and necessity.” The FCC must hold a hearing if it encounters a substantial question on that point, the court said, and a credible allegation of deliberate distortion of significant news events or issues indeed raises a substantial question. The court went on to say that in this case petitioner Serafyn had presented evidence of a general pattern by *60 Minutes* to distort news, beyond the one segment. This evidence included quotes by correspondent Mike Wallace and producer Don Hewitt suggesting that the show considered it acceptable to sometimes lie. Serafyn also presented specific evidence of factual inaccuracies. Therefore, the court held, the FCC erred in categorically refusing to investigate the allegations of unfair, intentional distortion.

## CHILDREN’S TELEVISION

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Consumers and the government have long been concerned about the quality of children’s programming on TV and about the potentially overbearing effects of commercials aimed at youngsters. Congress addressed both concerns in the Children’s Television Act of 1990.<sup>17</sup> The act required the FCC to adopt specific rules limiting the number of commercial minutes during children’s programming. Furthermore, the commission was ordered to consider at renewal time whether the licensee has met the commercial limits and also the extent to which the licensee has served the “educational and informational needs of children.” The FCC issued rules and policies that went into effect in 1991.<sup>18</sup>

### COMMERCIAL LIMITS

The commercial limits apply to programs originally produced and broadcast primarily for an audience of children 12 years old and younger. During such programming, commercials must be limited to 10.5 minutes per hour on weekends and 12 minutes an hour on weekdays. Commercials are defined by the FCC as air time sold for purposes of selling a product or service. TV stations are required to maintain records in their public inspection files demonstrating compliance with these limits.

Of particular concern in recent years has been the growth of so-called program-length commercials. The commission defines a **program-length commercial** as “a program associated with a product, in which commercials for that product are aired.” A children’s program becomes a program-length commercial if a product associated with the program appears in commercial spots not separated from the start or close of the program by at least sixty seconds of unrelated material.

Any children's program found to be a program-length commercial will count in its entirety toward the commercial limits and therefore will obviously exceed the limits.

The FCC has historically assessed dozens of forfeitures—the FCC word for fines—every year for commercial time overages. The commission considers several factors when determining the appropriate forfeiture amount, including the number, type, and duration of overages, and the reasons for the violations. The FCC has routinely assessed higher fines for program-length commercials than for conventional overages. A couple of typical examples: In 2000 the commission issued a \$14,000 forfeiture order against KXLY-TV of Spokane, Washington, for exceeding children's television commercial limits twelve times during its license term. Ten of these were program-length commercials and two were conventional overages. In 2001 the FCC assessed a \$25,000 forfeiture against WCCB-TV in Charlotte, North Carolina, for exceeding the limits seventy times during its license term. Thirteen of these overages were deemed program-length commercials.

## REQUIRED PROGRAMMING

Throughout its license term, every commercial TV station is required to serve the educational and informational needs of children aged 16 or younger, both through its overall programming and through programming that is *specifically designed* to meet those needs (referred to as core children's programming). Given the traditional leadership of public television in the area of children's programming, the commission decided not to apply this programming content requirement to noncommercial stations. Licensees are not required to target programs to all children of ages in the 16-and-under range. But at renewal time, a broadcaster is expected to have aired programming specifically designed to serve the needs of children of at least some age within that range.

Educational and informational programming is defined as that which furthers the positive development of children in any respect, including children's cognitive/intellectual or emotional/social needs. Initially, though, the commission established no guidelines for the kinds of programs that would qualify and for the minimum amount of such programming that must be aired.

In 1996 the FCC adopted new rules and guidelines to strengthen enforcement and eliminate the squishiness of the original rules. The revised rules are as follows:<sup>19</sup>

**Core children's programming** is defined as programming that has as a *significant purpose serving* the educational needs of children. It must be aired between seven A.M. and ten P.M.; it must be regularly scheduled at least weekly; and it must be at least a half-hour program. In comments accompanying the new rules, the FCC stated that core children's programming does not include general audience and entertainment programming (such as reruns of old sitcoms, presumably).

At license renewal time, FCC staff will automatically deem a broadcaster in full compliance with the programming requirements if the station aired on average

at least three hours per week of such core programming. As an alternative, stations can also earn quick staff approval by demonstrating that they aired a combination of core programming and packages of other educational programming, such as public service announcements, specials, and short-form programs that are equivalent to at least three hours per week of core programming. If a station does not meet either of these guidelines, the FCC staff will refer the matter to the full commission to determine if the educational needs of children have been sufficiently met in some other fashion.

TV stations must file a “children’s television programming report” with the FCC quarterly and must also include it in their public files (see Exhibit 9.2). In addition, stations must identify their educational children’s programming, both on air and in programming guides.

For years the FCC fined TV stations for commercial-time violations and for failing to properly identify and document children’s programming. But the commission did not issue fines directly for failing to air a sufficient amount of qualified children’s shows. Finally in 2008 the years of forbearance ended. Wrote the FCC in its notice of liability: “[W]e find that Channel Eleven, Inc., licensee of Station WETV-LP, Murfreesboro, Tennessee, apparently willfully and repeatedly violated Section 73.671 of the Rules, by failing to air programming specifically designed to serve the educational and informational needs of children.”<sup>20</sup> The stated fine for these violations was \$20,000.

## OTHER BROADCAST RULES

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Congress and the FCC control broadcasting content in many other ways, including prohibitions from airing certain kinds of content and mandates to air other specified content. Following are a few of the more important laws. In all cases, keep in mind that with the Obama administration came new FCC commissioners and promises to reform the agency. It remains to be seen, in each area of content regulation, whether the agency will enforce the law more aggressively or more leniently, or whether some formal change of direction will be charted.

### SPONSOR ID

The Communications Act and FCC rules generally require that sponsored messages on the air include the identity of the sponsor.<sup>21</sup> The sponsor-ID rules are essentially two-tiered: When broadcasters are paid to air messages, such as typical product advertising, the message must indicate that it was paid for, and by whom. With most commercial advertising the sponsorship is clearly built into the message, and the broadcast licensee need do nothing more. If submitted material is political in nature or deals with a controversial issue, whether paid for or not,



then additional and more specific rules apply to make sure the sponsor is obvious to the audience. For example, FCC rules on televised ads for political candidates require all such ads to include a visual sponsor ID stating that the spot was “sponsored by” or “paid for by” a named person or organization. The identification must be in letters equal to at least 4 percent of vertical screen height, and the ID must be on the air for at least four seconds.

Historically, sponsor ID has been a fairly straightforward compliance matter. But recent years have seen an increase in nontraditional kinds of sponsored persuasion. These include brand product placement within other programming, political advertising by organizations other than candidates, and video news releases on public issues. As a result, sponsor ID has become a bigger concern of the FCC and warrants greater vigilance by broadcasters.

Particularly troubling in recent years has been the airing of sophisticated video news releases, or VNRs. These are prepackaged, ready-to-run “news” stories submitted to TV stations by private companies, political organizations, and even government agencies. When aired without alteration or clarifying introduction, VNRs may violate the law. In 2004 some broadcasters came under attack for airing VNRs produced by the Bush administration in Washington, D.C., and the Schwarzenegger administration in Sacramento. The VNRs touted government policies, but blended right into broadcast news programming. In April 2005 the FCC issued a public notice to remind broadcasters that whenever VNRs are aired, the sponsorship identification rules generally require stations to disclose the nature, source, and sponsorship of the material. Viewers are entitled to know who seeks to persuade them with programming offered over the air, the FCC’s notice said. Then in 2007 the commission issued its first fines specifically for airing VNRs, relating to commercial products, without adequate sponsor ID. Reportedly some 100 similar complaints about “fake news” were pending with the FCC by that year.

It’s hard to argue, of course, that compromising the integrity of newscasts is a good practice. Yet many broadcasters find it troubling that the government has now so squarely entered the domain of the newsroom, potentially second-guessing news-department decisions that in many cases are not so clear-cut. What if the VNR had been significantly edited and packaged within a larger story produced by the station? What if the station quoted substantially from a traditional, paper-copy release? At what point should the First Amendment intervene to shield the broadcaster’s judgment?

## HOAXES

In the early 1990s, the FCC received complaints about several on-air radio station hoaxes. In one case that took place during the Persian Gulf War, a station in St. Louis, Missouri, interrupted what appeared to be regular music programming and announced: “Attention: civil defense warning. The United States

is under nuclear attack.” This was accompanied by a variety of sound effects, including muffled screams and explosions and a loud tone similar to the distress signal associated with the Emergency Broadcasting System. The broadcast was intended as satire, but some listeners didn’t understand it that way. The FCC in 1991 assessed a \$25,000 fine against the station for violating a Communications Act prohibition on transmitting false distress signals.

In another case a Los Angeles station aired an apparent murder confession that generated a police investigation and substantial publicity. Nearly a year passed before the station’s management and the public learned that the confession was a hoax. The FCC subjected the Los Angeles station to a costly and embarrassing inquiry pursuant to the general investigative powers contained in section 403 of the Communications Act. Ultimately, no formal punishment was handed down because management was not involved in the hoax. But in egregious cases, the commission presumably could initiate a license revocation hearing.

The cluster of radio hoaxes convinced the FCC that it needed a specific rule on hoaxes—a rule that would give the commission greater flexibility to levy forfeitures and other forms of punishment for harmful on-air hoaxes. In 1992 the FCC adopted a new rule that prohibits the broadcast of false information concerning a crime or catastrophe if it is foreseeable that the broadcast could cause substantial public harm and if the broadcast does in fact directly cause substantial harm.<sup>22</sup> Legal experts for the broadcast industry criticized the rule as an awkward and unwise attempt at content regulation. If the proposed regulation were adopted, one expert wondered, could radio stations legally rebroadcast Orson Welles’s classic “War of the Worlds” production?

## CONTESTS

Contests have long been standard programming on radio. The FCC has a specific regulation on how contests must be run, however, that says in part: “A licensee that broadcasts or advertises information about a contest it conducts shall fully and accurately disclose the material terms of the contest, and shall conduct the contest substantially as announced or advertised. No contest description shall be false, misleading, or deceptive with respect to any material term.”<sup>23</sup>

In 2009 the FCC found station KDKA (AM) of Pittsburgh in violation of the contest rule and issued a notice of liability for a \$6,000 fine. A talk show host at the station, Marty Griffin, apparently announced he would give away “one million dollars” to the thirteenth caller and “a million an hour” thereafter. One caller, who ultimately filed the FCC complaint, was told he was the thirteenth caller and then was put on hold for nearly 45 minutes. Eventually Griffin got on the line and chatted with the caller briefly. But when the caller asked about the prize, the call was disconnected. The caller dialed back and was told he was “the only person in the area” who didn’t understand that it was a joke.

In the resulting FCC proceeding, the station licensee argued that the broadcast was a “harmless prank,” not a real contest. But the FCC said the recording and transcript of the broadcast demonstrated that the public could indeed have been misled into thinking the contest was real.<sup>24</sup>

## INDECENCY

For many years, the FCC has maintained rules against the broadcast of “indecent,” sexually oriented material and profanity during hours when children are likely to be in the audience. Active enforcement of the indecency prohibition seems to come in cycles, with a major enforcement push running from about the mid-1980s to the mid-1990s and another one from 2003 to at least 2008. (The highly controversial indecency rules are discussed in detail in Chapter 11, along with other forms of control on adult expression.)

## PROGRAM RATINGS AND V-CHIP

The Telecommunications Act of 1996 required TV set manufacturers to include in new sets the so-called V-chip, which allows parents to screen from their young children violent and sexually oriented programming. Such programming carries a coded signal that can easily be blocked and unblocked using the V-chip system. The FCC adopted specific V-chip system rules that, effective in 2000, required the V-chip in all new sets with 13-inch screens or larger. In 2007 the FCC issued a notice of liability for a \$7.7 million fine against digital TV manufacturer Funai for shipping sets interstate without the stipulated V-chip technology.

Far more controversial than the technology, however, was the program ratings system that was to accompany it. The Telecommunications Act required the television industry to come up with a “voluntary” ratings system, similar to the ratings used for years by the film industry. If the TV industry failed to devise its own ratings, then the FCC was directed to do so. Advocates saw this as a necessary tool for responsible parenting. Critics claimed it was a form of government censorship in disguise. The industry decided to play ball, however, and in 1998 the FCC approved a ratings system hammered out by TV broadcasters and parent advocacy groups with help from the Motion Picture Association of America. The system identifies programs by suitable age group and also by the category of possibly objectionable content, using V for violence, S for sexual content, L for foul language, and D for sexually suggestive dialogue. V-chip television sets can be programmed to block shows according to the rating codes.

The mandatory blocking technology, coupled with a reasonable ratings system, put significant control in the hands of parents. Initially there was much concern and speculation about the effects. But the concern soon dissipated. As the *New York Times* reported in 2001: “For all of the fire that surrounded the debate

over the V-chip—Was it to be a new form of censorship? Would it hurt network ratings?—the device has had little impact on ratings or viewing habits.”<sup>25</sup> Various public surveys have found that among households with children and V-chip sets, 15 percent or fewer ever use the blocking tool.

## **VIOLENCE REGULATION?**

A big question as of this book’s publication was whether the new FCC would continue the push for a direct prohibition of “excessive violence” on TV or whether it would altogether drop the idea and rely on less-intrusive tools (such as V-chip and ratings) that allow parents to make their own household choices. In 2007 the FCC, responding to a request from Congress, issued a report titled “Violent Television Programming and Its Impact on Children.” The report said research tends to show that exposure to TV violence can spark aggressive behavior in children, at least in the short-term. It went on to say that the V-chip and ratings had been of limited success in shielding children, and the FCC urged Congress to consider a law prohibiting “excessively violent content.” The report prompted both houses of Congress to hold hearings on TV violence in 2008. Speculation arose that Congress might authorize the FCC to regulate violence much as it does sexual “indecentcy.” Any such attempt would face very difficult constitutional hurdles, however.

## **CONTROL OF CABLE TV**

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Cable TV systems began operating in the United States in the 1940s, not many years after broadcast TV became commercially viable. The early cable systems were established primarily to deliver clear TV pictures to communities where mountains or other barriers prevented good reception of over-the-air signals. For the typical system, a large antenna was constructed adjacent to the community, usually on a hilltop, to allow the collection of a high-quality signal from TV stations in the vicinity. The signal was delivered via cables directly to homes in the community. It was originally called community antenna television, or CATV, and cable operators were no more than passive relayers of area TV signals.

But over the years, cable operators began offering additional programming services by importing signals from distant stations and in some cases by originating their own local programming. The 1960s and 1970s brought dramatic technical advances to the cable industry: satellite and microwave receiving stations, improved coaxial cable hardware, and signal conversion boxes for the home. In the 1980s many systems were delivering twenty-five or even fifty channels to their subscribers, and the future promised two-way, interactive programming services. By the 1990s nearly two-thirds of American homes were served by cable, with much of the programming specifically produced for cable.

Cable had become a major mass medium in its own right and a worrisome competitor for the broadcast TV industry. Powerful cable TV systems upset the established regulatory scheme and presented tremendously difficult legal challenges to Congress, the FCC, and local governments, which grant cable franchises.

Over the past few decades, cablecasting has experienced an oscillating legal world of no regulation, regulation, deregulation, and reregulation. Much of the regulation has focused on cable content. And much of it has been sparked by Congress's desire to protect the local marketplace viability of over-the-air (that is, regular network and independent) TV broadcasting that is free to all viewers. Among the earliest regulations, for instance, was a rule that cable systems must carry the nearest station affiliated with each network rather than import the signal of a distant affiliate. This rule was intended to prevent cable systems from, in effect, steering viewers away from their local stations.

## FIRST AMENDMENT STATUS

One of the hotly debated questions in cable TV law for many years was whether cable system content could be regulated at all. Industry representatives and some legal scholars have argued that cable companies deserve the same full-strength First Amendment shield accorded newspapers and other print media. A cable system does not broadcast over the public airwaves, after all, so there is no problem of clogging a naturally occurring, physically scarce resource. There is no physical limit to the number of cable channels that can be delivered to a home. Nor is there a necessary physical limit to the number of cable operators that can serve a community. Just as another newspaper or two could always decide to circulate in a town, another cable operator could, in theory, string its lines. Without a physically scarce resource at issue, the critical regulatory rationale described in *Red Lion* would appear inapplicable.

A prevailing constitutional approach among the lower courts was evident by the late 1980s: Cable regulations not based on content—even though they affect content—were given the intermediate-level scrutiny articulated by the Supreme Court in *United States v. O'Brien*.<sup>26</sup> A regulation would be upheld if it advanced an important governmental interest unrelated to the suppression of speech and if the regulation did not burden substantially more speech than necessary. When assessing the validity of content-based regulations, on the other hand, courts were tending to use strict scrutiny, requiring a *compelling* justification.

The judicial trend, then, was to treat cable operators much like the print media, with substantial First Amendment protection.

### The Turner I Case

It wasn't until 1994, however, that the Supreme Court verified that this indeed was the proper standard for the cable medium. At issue in *Turner Broadcasting*

*System v. FCC (Turner I)* was the validity of a statute requiring cable operators to carry the signals of local broadcast stations. The Court first needed to determine whether cable, for purposes of First Amendment analysis, could be accorded the relaxed constitutional protection that applies to broadcasting. The Court concluded that it could not. Wrote Justice Kennedy for the Court:

[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation. The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium. . . . [C]able television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium.<sup>27</sup>

Therefore, the Court held, cable TV regulations should be scrutinized under the same strict First Amendment standards applicable generally to nonbroadcast media.

Of course, this does not mean that all government regulation of cable is invalid. Unique aspects of the cable medium may still justify restrictions that generally would not be valid if applied to other media. Particularly if the regulations are not content based, they have a reasonable chance of passing the *O'Brien* test and being upheld by the courts.

### **What Is Content-Based?**

A key, then, in any constitutional inquiry of cable regulations, is whether the restrictions are content based. And this is not always an easy call. One of the best cases for illustrating this problem is *City of Los Angeles v. Preferred Communications, Inc.*,<sup>28</sup> which arose from the local franchising process. Cable company Preferred Communications sought to lease space on city utility poles so it could provide cable TV service to a section of Los Angeles. The city responded that the company could not lease space unless it first obtained a cable TV franchise from the city, and it refused to grant a franchise because Preferred had not participated in the competitive bidding process used by the city to award a single franchise for the area. Preferred went to federal court, claiming that it was a First Amendment violation to refuse access when the utility poles contained excess physical capacity. Preferred also claimed that the franchise process was unconstitutional because it discriminated against franchise applicants based on content considerations.

The federal District Court in 1990 and 1991 issued rulings on numerous motions for summary judgment made by both parties. The district judge employed the intermediate scrutiny *O'Brien* test to determine the constitutionality of city regulations that imposed an incidental burden on speech. But for restrictions

that directly curtailed expression, the court used the strictest level of scrutiny, requiring the city to show that its restrictions were precisely tailored to serve a compelling government interest.

Based on these tests, the trial judge ruled that the following were direct restrictions on speech and were unconstitutional: eight mandatory public access channels; the consideration of overall owner character in awarding franchises; a state-of-the-art technology requirement; and a requirement that the cablecaster create a community advisory board, subject to city approval.

The court also invalidated two indirect restrictions on speech. One was the limitation of one cable operator per franchise area; the other was a requirement of a \$10,000 filing fee.

The District Court upheld the city's requirement that local individuals or groups participate in the ownership and operation of the system. It also upheld the requirements that franchisees pay a 5 percent franchise fee and be financially and technically qualified; and that the city have access to poles and towers erected by the cable company and the right to inspect company business records.

## THE CABLE ACTS

In the 1970s cable became a heavily regulated industry. Every level of authority was involved—the federal government, the states, and especially cities and counties. Local municipalities by and large awarded the franchises (as noted in Chapter 9), and in exchange they demanded rate limits and many other technical and non-content assurances. But the municipalities also extracted content assurances, such as programming promises and community access channels. Cities and counties also set standards for such things as equipment and franchise application and renewal procedures. The FCC also had an interest in national regulation of cable, largely because of the medium's possible effects on broadcast media. Different levels of government were essentially vying for control over cable, and the blossoming cable industry was caught in an increasingly harsh and uncertain legal environment.

The courts began to enter the picture, and some regulations were invalidated. But it had become obvious by the early 1980s that national coordination was necessary.

In an effort to clarify the regulatory picture, Congress enacted the Cable Communications Policy Act of 1984.<sup>29</sup> The Cable Act for the first time established a national policy for cable regulation, and it allocated regulatory responsibility to the different levels of government. In the end the act actually helped to deregulate some aspects of cable. Major features of the 1984 act included the following:

1. Local governments were recognized in the act as proper authorities to issue cable franchises. The act permits a municipality to award one or more franchises within its jurisdiction.

2. Franchising governments have authority to request that cable operators reserve channels for public access, educational, and governmental uses.
3. Franchising authorities generally are prohibited from establishing requirements for specific kinds of programming.
4. Technical standards relating to the facilities and equipment of a cable system are set primarily by the FCC.

The 1984 Cable Act represented a major compromise between cable operators and various levels of government. Nevertheless, the future of the Cable Act was not peaceful. On the one hand, cable operators challenged the constitutionality of provisions in the act. And on the other hand, broadcasters, some consumer groups, and members of Congress pushed for additional regulation.

In 1992, Congress did enact more regulation, over a presidential veto, with the Cable Television Consumer Protection and Competition Act. The 1992 act was prompted to a large extent by consumer complaints about the rising costs of cable service and a lack of cable competition. The act authorized cable rate regulation by the FCC and by municipalities, prohibited cities from promising exclusive cable franchises, and directed the FCC to develop additional technical standards for cable. It also contained various provisions intended to protect broadcasters from the growing competition from cable.

But the Telecommunications Act of 1996 in turn repealed many provisions of the 1992 act, including most of the highly contentious cable rate regulations. The prevailing view in Congress at the time was that ultimately consumers would be better served by allowing market forces to determine how the cable industry would grow, compete, and invest in new technology.

To say that regulation of cable has been unsettled would be a profound understatement. It is a difficult chore, however. Many over-the-air TV broadcasters are wary of cable as a competitor and miffed by the fact that cable operators can deliver broadcast-generated programming without incurring the production costs. Cable operators promise continually expanding consumer choice and wondrous technology, if only government will stand aside and allow the industry to expand. And government is trying to mold and remold the rules so that both industries can prosper—along with satellite, telephone companies, hand-held wireless, and other providers of video programming. Two of the most contentious content-related topics for cable have been mandatory access channels and the must-carry rules.

## ACCESS CHANNELS

Franchising authorities are permitted under the 1984 Cable Act to require that cable operators set aside channels for public access, educational, and government use—sometimes called **PEG channels**. Cablecasters have challenged the constitutionality of mandated PEG channels, sometimes with success. But as long as the obligatory number of PEG channels is not too extensive or burdensome,



the requirement is upheld as both constitutionally permissible and statutorily authorized.

What remains, however, is a slew of sticky questions about the exact legal relationship between the local government, the private cable operator, and the users of the public access channels. Who is legally responsible for the content on these mandated channels? Can the content be screened in any way? Or are these “public forums” in the eyes of the law, the electronic equivalent of a soapbox in the park?

The 1984 Cable Act attempted to clarify some of these issues by stating that cable operators could not exercise any editorial control over outside parties’ use of public access channels, except to censor what they believed to be obscenity. At the same time, the cable operator was granted sweeping immunity from any libel, obscenity, incitement, invasion of privacy, or false advertising problems that might occur during use of an access channel. So, only the PEG channel users themselves would be liable for any torts or crimes arising from their expression.

But in the 1992 Cable Television Consumer Act, Congress backtracked and again clouded the legal picture. A provision in the act permitted—though did not require—cable operators to screen out “indecent” or “offensive” sexually oriented material on their public access channels. “Indecent” material covers a much broader range of programming than obscenity (as explained in Chapter 11), and most of it is protected expression under the First Amendment. So the predictable constitutional question arose: If a private cable operator does take action to screen out sexually offensive material from public access programming, specifically under authority of the 1992 Cable Act, does this equate to “government action” and a form of unacceptable censorship under the First Amendment?

In 1995 a federal Court of Appeals said no—that the screening by a private cable operator could not be attributed to government and therefore the First Amendment was not implicated.<sup>30</sup> But on review, the U.S. Supreme Court concluded otherwise. In *Denver Area Educational Telecommunications Consortium v. FCC*,<sup>31</sup> the badly fractured Court did not directly answer whether an access channel is a public forum. The majority did, however, equate PEG channels to “reservation of a public easement, or a dedication of land for streets and parks, as part of a municipality’s approval of a subdivision of land,” and a place where the private landowner no longer retains control. For the government to specifically authorize control was a form of state action, which in this case was not narrowly tailored to the government’s interest in protecting children from sexual content. Therefore, the Court invalidated the screening provision of the 1992 act as a violation of access channel users’ First Amendment rights.

So the general rule is that once a public access channel is set up at the demand of a franchising government, the government is prohibited from controlling the expression on that channel (by the First Amendment), and the cable operator also is generally prohibited from exercising control over content (by the 1984 statute).

For example, when the City Council of Kansas City, Missouri, learned that the Ku Klux Klan intended to make regular use of the local access channel, the

council decided to close the channel. It was to be converted to a local programming channel controlled by the cable operator. But the Klan went to court, and a federal district judge ruled that the First Amendment prevented the city from closing the access channel if its purpose was to keep the Klan off the channel. The court said government could not manipulate the channel in a manner that discriminated among viewpoints.<sup>32</sup> The city eventually agreed to reinstate the public access channel and pay the Klan's legal fees.

Still, local governments, cable operators, and the organizations they sometimes authorize to manage their access channels naturally want those channels to operate as smoothly as possible, to meet their community enhancement ideal, and to exhibit a reasonable degree of programming quality. How can that be accomplished? What particular actions can they take that will not run afoul of the First Amendment or the 1984 Cable Act? The questions are still being litigated.

For example, may a fee be charged to cablecast access channel programs that are not locally produced? A federal appellate court in 1999 said no.<sup>33</sup> May release forms be required of all people who appear on an access channel? May program providers be required to indemnify cable operators for any legal fees incurred? May statements of compliance be required, vowing not to record any illegal act? A federal District Court said in 2002 the likely answer to these questions was no, and it issued preliminary injunctions.<sup>34</sup>

## MUST-CARRY

Concerned that local television stations were no longer able to compete effectively with the growing cable industry, Congress in the 1992 Cable Television Consumer Act required cable operators to carry the signals of local, full-power television stations, both commercial and noncommercial, up to specified limits. The number of channels that must be set aside for local broadcast stations depends on the size of the cable system.<sup>35</sup>

This **must-carry law** was intended to protect the market for local broadcasters who might otherwise find themselves edged out by cable systems that fill their channels with imported, distant broadcast signals and other cable programming. When TV viewers subscribe to a cable system, they will not tend to detach from that system in order to view a local station. Therefore, if a local station is not available on the cable system, it will lose viewers, resulting in lower ratings, resulting in lower advertising revenues, which will lead to decreased programming quality, even lower ratings, and ultimately economic failure. This line of reasoning led Congress to impose must-carry obligations on cablecasters.

From the cable operator's viewpoint, however, the must-carry obligations were an intrusion upon free speech. Although cable operators mainly transmit programming from other sources, they engage in their own, protected expression when they exercise editorial discretion over the menu of channels they offer. The must-carry law takes away some of that discretion and, in systems of limited channel

capacity, the local carriage obligations may force other desired programming out of the channel lineup. Producers and programmers of cable content were also upset, of course, because the must-carry law rendered it more difficult to attain carriage on the more limited number of channels remaining.

## Turner II

As mentioned previously, the must-carry law was challenged in the 1994 Supreme Court case of *Turner Broadcasting System v. FCC (Turner I)*. Numerous cable operators and cable programmers alleged that the must-carry provisions violated their First Amendment rights. Although the Supreme Court's 1994 *Turner I* ruling did clarify the First Amendment standard applicable to cable, it did not ultimately resolve the dispute over must-carry. The Court determined that the law was not content based; that is, the rules did not impose a burden on cable operators or programmers by reason of the views or programs carried. Therefore, the Court said, the must-carry provisions should be analyzed under the intermediate scrutiny test of O'Brien. The content-neutral law would be upheld if the government could show that it significantly advanced important government interests. But the Court at this point became fractured, with some justices finding the must-carry provisions unconstitutional on their face, one justice finding them constitutional without need for further inquiry, and other justices desiring additional factual findings. The case was sent back to the District Court for additional fact finding.

In 1997 the case was back at the Supreme Court, and again the justices were sharply divided. But by a 5–4 majority, the Court in *Turner II*<sup>36</sup> upheld the must-carry requirement. Writing for the majority, Justice Kennedy noted a trend toward concentrated ownership of multiple cable systems and toward ownership or affiliation agreements with cable programmers. There was sufficient evidence collected by Congress, the Court majority found, that these increasingly powerful cable systems would tend to drop local broadcast signals in favor of their affiliated national programmers. Evidence also made it reasonable to conclude that this would cause economic hardship for many stations. Given assured cable carriage and concomitant higher audiences for local TV, more local stations would secure the revenues they need to succeed. Therefore, the majority held, the must-carry requirement serves the important governmental interests of preserving free, over-the-air local television for the public, promoting a multiplicity of programming voices, and promoting fair competition in the market for TV programming.

Furthermore, Justice Kennedy concluded that the law was no broader than necessary. As a result of must-carry, broadcast stations gained carriage on 5,880 cable channels nationwide. This was not an overly broad burden on the half-million cable channels that existed at the time, Kennedy concluded.

Justice O'Connor filed a strong dissenting opinion, however, in which she accused the majority of making too many assumptions and granting too much

deference to Congress, given the seriousness of the First Amendment issue at stake. O'Connor said there was insufficient evidence to conclude that the broad must-carry approach was actually necessary to prevent a significant reduction in the multiplicity of broadcast programming sources or to prevent anticompetitive conduct by cable systems. Instead, she said, must-carry should be applied more narrowly, only in markets where a need to protect the economic viability of TV stations is actually demonstrated.

### ***Retransmission Consent***

Under the must-carry statute and regulations, a local station that exercises its must-carry right is entitled to cable carriage in its market, but it does not receive compensation from the cable operator. Therefore, the law gives each TV station an option known as **retransmission consent**, which became effective in 1993. This alternative permits the broadcaster and cable operator to negotiate cable carriage arrangements, with the station receiving compensation in return.<sup>37</sup>

In the FCC regulations, commercial TV stations must elect every three years between retransmission-consent and must-carry status. Local cable operators must be notified, in writing, of the decision. For those stations that elect retransmission consent—typically popular stations with greater bargaining power—a local cable system is *not allowed* to retransmit the signal without first negotiating a retransmission agreement with the station. This may mean that a cable system will have to pay a popular station for the right to carry its signal in the cable lineup. TV stations with less bargaining power in their markets will favor must-carry status to avoid the risk of being left off the cable menu. Once made, the election cannot be changed during the three-year period. If no election is made, the law assumes must-carry status for the duration of the period.

Stations that elect retransmission-consent status are then obligated under FCC rules to negotiate in good faith in attempting to reach a retransmission agreement. These agreements vary considerably, depending on the negotiating leverage of the stations. In many cases, cable companies have paid no monetary compensation, though stations may have bargained for other benefits, such as channel position, promotional spots on the cable system, or cooperative program ventures.

## **OTHER CABLE CONTENT RULES**

Some of the broadcast content regulations discussed previously are, by separate regulation, also applied to programming originated for cable. These include, for example, the equal opportunities rule,<sup>38</sup> the commercial time limits during children's programs,<sup>39</sup> and the sponsorship identification requirement.<sup>40</sup> Such content rules are always suspect when applied to cable, given the medium's greater First Amendment protection. But content regulations have been the target of relatively few lawsuits by cablecasters because cable operators primarily deal with

secondary transmissions; broadcasters are initially responsible for much of the programming transmitted on cable. To the extent that cable operators do originate their own programming, however, they are subject to rules nearly identical to many of the broadcast restrictions.

One kind of restriction that has generated successful court challenges by cablecasters is prohibitions against indecency. In the 1985 case of *Cruz v. Ferre*,<sup>41</sup> for example, a federal Court of Appeals held that the kind of indecency prohibition that applies to broadcast cannot constitutionally be applied to cable. The court characterized cable as a less-invasive medium without the same compelling justifications for content controls. (This issue is discussed further in Chapter 11.)

### ***Syndex and Network Non-Dup***

Two additional cable content regulations deserve mention here: the **syndicated program exclusivity rule** (known as **syndex**)<sup>42</sup> and the cable **network non-duplication rule**.<sup>43</sup> Both are imposed on cable operators in an effort to protect broadcasters.

In the contract negotiated between a supplier of syndicated programs and a broadcast TV station, the syndicator typically will grant the station the right to be the exclusive carrier of the show in the station's local broadcast area. Under the syndex rule, the station possessing such exclusive contract rights may forbid any cable company from importing the same syndicated program into the community from another, distant source. This rule may be invoked by a TV station no matter what its relationship with a local cable operator. For instance, if retransmission consent negotiations break down and a station is dropped from a cable system within its market area, the station may still insist that the cablecaster delete any duplicating syndicated programs the cablecaster may wish to carry from distant stations. The FCC repealed its syndex rule in 1980, but reinstated it in 1988.

The network non-duplication rule works in the same way to protect a local station that is a network affiliate. The rule says that upon receiving notice from a local station with exclusive network programming rights within the market, a cable operator located in that market shall not carry that programming as broadcast by any other TV signal.

## **SATELLITE SYSTEMS**

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Over the years a number of services have been touted as the next alternative to broadcast and cable for delivering traditional TV programming. These have included multipoint distribution service (MDS) microwave systems, direct broadcast satellite (DBS), and programming delivered by the telephone companies. Naturally, any successful alternative technology had the potential to upset the competitive balance and pose special challenges for content regulation.

As the new century began, DBS had broken through the pack to join cable and broadcast as the major third competitor in the delivery of TV programming to consumers. The technology includes transmitting stations on the ground that send signals on an uplink frequency to a satellite positioned in stationary orbit, thousands of miles above the Earth's equator. The satellite then retransmits the signals on a downlink frequency for reception directly by consumers.

The FCC granted the first applications for DBS systems in 1982. But the ten-foot wide receiving dishes were prohibitively large and unsightly in the minds of many consumers, economic problems mounted for the industry, and the original DBS companies bailed out. A decade later, however, DBS roared back, aided by a new generation of satellites with more powerful transmitters and the ability to use home receivers closer to the size of a Frisbee flying disc. By 2009 DBS service in the United States had grown to 31 million subscribers through two companies: DirecTV and Dish Network.

The recent growth of satellite may also be attributed to changing federal communications law. One of the reasons satellite carriers had a tough time competing with cable for many years was that cable systems were local and provided subscribers with access to their local TV broadcast signals. Satellite carriers did not provide these signals, in part because, technologically, they were national services, but also in part because satellite, unlike cable, did not enjoy a statutory copyright license to retransmit local programming.

As satellite technology improved, carriers developed the channel capacity to offer local-into-local signal services to subscribers in some markets, thus putting DBS in a position to compete head-to-head with cable. All the satellite carriers needed to make it practical was a statutory copyright license to retransmit the programming of local broadcast stations back into those local markets, without having to pay royalties to all the program copyright holders. This license was granted in the Satellite Home Viewer Improvement Act of 1999 (SHVIA)<sup>44</sup> (discussed under "Special Problem: Cable Retransmissions" in Chapter 8).

This pleased the DBS companies. But in addition to amending the Copyright Act, the SHVIA also amended the Communications Act by creating must-carry requirements for satellite carriers—essentially keeping DBS on statutory parity with cable. Effective in 2002, the act required all satellite carriers who take advantage of the statutory copyright license for local-into-local retransmissions to "carry upon request the signals of all TV broadcast stations located within that local market."<sup>45</sup> This is known as the carry-one, carry-all rule. As with cable, a local TV station may elect mandatory carriage or may choose a retransmission-consent option. But unlike the cable rules, the obligation to carry all local stations applies only if the DBS carrier chooses to take advantage of the statutory copyright license with respect to one or more stations in the market. If a DBS company decides not to retransmit even one signal from a given local market, then it has no carriage obligations in that market.

The FCC adopted rules implementing SHVIA that went a bit farther by stipulating how satellite carriers may package and sell the local stations to their DBS subscribers in a given market. In *Satellite Broadcasting & Communications Assn. v. FCC*,<sup>46</sup> the satellite industry challenged the carry-one, carry-all requirement and the accompanying FCC rules as unconstitutional intrusions into editorial discretion over their products. But a federal appeals court in 2001 upheld the rules, which it categorized as content-neutral. Congress wanted to protect independent broadcasters from the harmful effects of “satellite cherry picking,” to preserve the multiplicity of local broadcast outlets for over-the-air viewers, and to prevent its grant of a statutory copyright license from actually undermining competition in local markets, the court said. It concluded that these are substantial interests and that they are materially advanced by the carry-one, carry-all rule.

An interesting legal battle to watch in the years ahead will be the inevitable attempts by Congress and the FCC to extend content-based restrictions such as the indecency ban to the satellite medium. What is the proper First Amendment standard for scrutinizing such attempts? The Supreme Court has not yet directly ruled on this question. Is satellite more like broadcast, and therefore subject to more regulation than other media? As with broadcast, satellite transmits via the radio spectrum. But on the other hand, is it really more like cable, and thus protected more stoutly by the Constitution? As with cable, satellite is subscription-based and offers the same, full range of parental-control technology.

## Summary Points

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**Among the content laws that apply to broadcasting**, none are more potentially burdensome than those relating to political candidates’ use of the airwaves. Chief among these is the equal opportunities rule, which applies to programming by both broadcasters and cable operators and is triggered when a candidate appears on the air for reasons other than bona fide news.

**Another pair of significant content laws** pertains to children’s television. TV broadcasters must observe strict limits on the number of advertising minutes they run during children’s programs, and they must also run a specified amount of programming specifically geared to meet the needs of children.

**Although the fairness doctrine is no longer a part of the landscape** for broadcasters, the FCC may enforce basic notions of fairness under its general mandate to license stations “in the public interest.”

**Recent Supreme Court decisions have confirmed** that cable TV enjoys the usual level of First Amendment protection, not the greatly relaxed level that applies to broadcast. Still, the courts have upheld a number of laws that significantly affect the content of cable systems and their major new competitor: satellite.

**Among the most contentious of cable laws** is the must-carry rule. It can play a major role in determining the menu of signals a cable system will offer.

**In the chapter Hypothetical, you would be free to exclude** the independent candidate from your radio debate without triggering the equal opportunities rule, so long as the debate was a good-faith effort to convey news—not a veiled effort to promote a particular candidate. Because the candidate is running for a state office, not a federal post, you also could decline the request for commercial time without violating the reasonable-access provision in the Communications Act. You could not, however, grant commercial time and then charge your very highest rate.

## Discussion Questions

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1. Do you think the lowest-unit-rate limitation for candidate commercials is working in the public interest, or is it merely a statutory perk for candidates? Given the shallow, misleading, and even mean-spirited nature of today's political advertising, should broadcasters be allowed to set extra high rates for political advertising if they wish?
2. On the other hand, is it a wise use of the nation's airwaves to stick to a schedule of sophomoric TV sitcoms during the height of campaign season, making it difficult for new candidates and potential leaders to become known and to succeed? Would a significant amount of mandated, free air time for candidates actually improve national discourse, help us solve problems, and help us spot and elect tomorrow's best leaders? Could such a system be devised with some safeguards against abuse, or would that violate the First Amendment?
3. Do you see any evidence that the children's TV programming requirement has had a positive impact in our society? As children shift more and more of their attention to the Internet and less time to TV, does it make sense to continue saddling TV broadcasters with the "kid-vid" programming rules?

## Key Terms

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core children's programming  
equal opportunities rule  
fairness doctrine  
must-carry law  
network non-duplication rule  
PEG channels  
personal attack rule

political editorial rule  
program-length commercial  
retransmission consent  
syndicated program exclusivity rule  
(syndex)  
Zapple doctrine



# Obscenity and Indecency



*After completing this chapter, you should*

- **Understand** the Supreme Court's basic approach to review of obscenity and pornography controls.
- **Know** how the Court defines obscenity and the difficulties in applying the definition.
- **Know** how local, state, and federal governments today attempt to control sexually explicit materials, including those that are not strictly obscene.
- **Know** how print and broadcast media are treated differently in the regulation of indecent language and depictions.

## A TOUCHY SUBJECT

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This chapter deals primarily with sexual content in public communication, though violence and plain old profanity to some extent also figure into the laws against obscenity and indecency. For most of the mainstream mass media, sexual content raises occasional ethical and professional issues, but rarely legal ones. And serious

## Hypothetical

### Steamy Commercials, Your Call

Imagine that you're the station manager for a broadcast television licensee in a major city. You've just received a thirty-second commercial from a pharmaceutical company that manufactures condoms, among other things. Your station hasn't aired condom advertising in the past, but the economy has been tough, and the station could use the revenue. Problem is, the commercial is sexually provocative.

The commercial shows a nude man and nude woman sitting in the center of a large bed, facing one another, looking into each other's eyes with excitement, with hands caressing each other's shoulders. The woman's breasts are visible. And there's a fleeting glimpse of the man's penis, covered with a fluorescent pink condom. The voiceover says: "Passion brand condoms. Hot colors for the hottest sexual experience." In addition to running this commercial throughout the broadcast day, the advertiser requests that you run a banner ad on your website. The banner contains a still photo of this bedroom scene and a link that consumers can click in order to see the video commercial and details about ordering the company's products. You have no screening procedure to prevent children from entering your website. The station's sales manager is eager for you to approve these advertising requests.

Meanwhile, your news director also has an interesting question. While the governor of your state was sitting on a stage, preparing to make remarks at a political fundraiser, he engaged in a serious chat with a city official sitting next to him. At one point the governor, referring to your U.S. senator and her support for a controversial tax law, said, "I wish she would stop doing this shit." An open microphone picked this up, and your news director wants to run the audio and video on your six o'clock news.

Would you run the condom commercials? And if so, would you limit them to certain hours of the day? Is there any legal concern with the proposed advertising on your website? And how about the news clip? Under the FCC's current indecency rules, would it be safe to run?

communications students rarely plan to be pornographers. Yet this area of law seems destined to remain forever in the spotlight of heated public debate. Efforts to regulate "adult" expression test our country's free speech philosophy and serve as vehicles for some of the nation's most important First Amendment rulings. Furthermore, these laws do snare individual media, writers, and artists from time to time.

The United States has had a very difficult time coming to terms with sexual expression, though this country isn't alone in that regard. To some degree, public tension and a sense of taboo about sexual expression can be found in most

cultures, both now and throughout recorded history. Sexually explicit materials can evoke intense and wide-ranging responses, from all-consuming curiosity to embarrassment, excitement, lust, or moral indignation.

In the United States today sexual expression in general elicits seemingly intractable, polarized opinions. What conclusions can be drawn, for example, when people respond with outrage to graphic sexual depictions or even to merely suggestive language? Some take this as proof that the American audience is backwardly puritanical or immature in its views about sex. To others, the outrage is an appropriate response to immaturity and immorality by the producers of this content.

The topic of sexual expression is also accompanied by much irony in the United States. Evidence suggests that Americans aren't very sophisticated in their knowledge of sex. In 1990, for example, 55 percent of a nationwide sample reportedly flunked a much publicized Kinsey Institute multiple-choice test on facts about sexual habits and problems.<sup>1</sup> Yet in this society, sexual innuendo, sex-oriented talk shows, and graphic sexual entertainment seem pervasive. An even more sobering irony, perhaps, is that the culture has wrestled so extensively with the allowable boundaries of sexual depictions while highly graphic portrayals of violence have been accepted in cinema and on TV screens with comparatively little protest and virtually no legal constraint.

This is the heated and confusing climate in which legal controls on sexual expression exist. The courts have worked hard to strike some middle ground. But just when it seems a legal truce has been achieved, another emotional conflict makes its way into headlines, either locally or nationally. In the 1990s this legal struggle spread to music lyrics, art museum exhibits, and websites. And in the first decade of the new millennium, computer-generated "virtual" pornography added yet another twist.

According to Adult Video News, a trade publication, graphic adult videos generated \$3.6 billion in sales and rentals in 2006. Adult magazines, cable pay-per-view, hotel video-on-demand, and adult Internet sites accounted for another \$5.5 billion in adult entertainment revenues. Some say this is evidence of a growing—even mainstream—acceptance of explicit sexual expression. At that same time during the Bush administration, however, federal obscenity prosecutions were declared a priority of the Justice Department, and the FCC was tightening its indecency rules.

Before moving on, note a few terms that will be used in this chapter. **Pornography** is a broad term used to describe all material that is sexually explicit and intended primarily for the purpose of sexual arousal. **Obscenity** has taken on a narrower, legal meaning, indicating a class of sexual material so offensive that it is deemed by the Supreme Court to have virtually no First Amendment protection; almost all jurisdictions have declared it illegal. An inherent difficulty in this area of law is the task of articulating specific standards for obscenity. **Indecency** has special legal meaning in the electronic media, referring to a class of speech that

is restricted on the broadcast airwaves, even though it is not necessarily obscene and would be legally allowable in other avenues of expression.

## HISTORY OF PORNOGRAPHY

Though graphic depictions of sex on videotape and in glossy magazines are, of course, a development of the modern media and society, sexual expression is not a modern aberration. The following account of the history of sexual expression is from the 1986 final report of the U.S. Attorney General's Commission on Pornography:

The use of comparatively explicit sexual references for the purpose of entertainment or arousal is hardly a recent phenomenon. Greek and Roman drama and poetry was frequently highly specific, and the works of Aristophanes, Catullus, Horace, and Ovid, to name just a few, contain references to sexual activity that, by the standards of the time, are highly explicit. Scenes of intercourse have been found on the walls of the brothel at Pompeii. . . .

Similar observations can be made about later historical periods and about other cultures. . . .

We can be fairly certain that sexually explicit descriptions and depictions have been around in one form or another almost since the beginning of recorded history, and we can also be fairly certain that its regulation by law in a form resembling contemporary regulation of sexually explicit materials is a comparatively recent phenomenon. It is difficult, however, to draw useful conclusions from this aspect of the history. . . .

[I]t is a mistake to draw too many conclusions about social tolerance and social control from the presence or absence of laws or law enforcement practices. There is little indication that sexual conduct was part of classical drama, and the very fact that many sexual references were veiled (however thinly) rather than explicit indicates that some sense of taboo or social stigma has always been in most societies attached to public discussion of sexuality. Yet although some degree of inhibition obviously attached to public descriptions and depictions of sexual acts, it is equally clear that the extent of these inhibitions has oscillated throughout history. In somewhat cyclical fashion, social tolerance of various practices has been at times limited and at times extensive. To conclude that inhibition, in some form or another, of public discussion and representations of sexual practices is a totally modern phenomenon is to overstate the case and to misinterpret the evidence from earlier times. But to assume that public discussions and descriptions of sexuality were, prior to 1850, always as inhibited as they were in English speaking countries from 1850 to 1950 is equally mistaken. . . .

. . . Throughout the seventeenth and eighteenth centuries, common law courts in England were only occasionally asked to take action against the kind of material that would then have been considered pornographic. Even when asked,

the courts were often reluctant to respond. In 1708, for example, James Read was indicted in London for publishing an extremely explicit book entitled *The Fifteen Plagues of a Maidenhead*. The Queen's Bench court, however, dismissed the indictment. . . . [Lord Justice Powell explained that the book "indeed tends to the corruption of good manners, but that is not sufficient for us to punish."] . . .

The history of the English experience with sexually explicit materials is largely paralleled by the experiences in other European countries, and the English colonies, including those in North America. As the world entered the nineteenth century, it remained the case that in most of the world there was greater tolerance for sexually explicit writing, printing, and drawing than there would be fifty years later. . . .<sup>2</sup>

## EARLY AMERICAN OBSCENITY LAW

By the mid-1800s, American law had clearly moved toward declaring sexually explicit materials illegal. Earlier prosecutions are on record against sex-oriented materials, both in England and in the American colonies. But these prosecutions were relatively rare. Courts throughout the 1700s, perhaps sensing a can of worms and lacking a clear mandate from the public, were reluctant to take action against sexually explicit materials. For example, in England in 1748 John Cleland published an explicit novel called *Memoirs of a Woman of Pleasure*, also known as *Fanny Hill*, without public outcry, government censorship, or legal prosecution.

When the law did occasionally intervene in the 1700s, it was not truly directed at sexual depictions. Rather, prosecutions were aimed at attacks on religion. Courts were not inclined to intervene in defense of some broad and cloudy notion of decency. But they would take action if the material containing sexual depictions amounted to religious blasphemy, a well-established crime of that era.

In the 1800s, though, the climate began to change. In Great Britain and the United States, prevailing societal views about sexual morality were becoming increasingly strict. At the same time, economical printing technology was making explicit descriptions of sexual activity increasingly available to the general public. Increasingly available, too, was pictorial material, especially with the development of photography. Social and legal confrontations were imminent. In England, private groups such as the Society for the Suppression of Vice demanded prosecutions for obscene libel, as it was then called, and people were frequently convicted throughout the 1800s for pure sexual explicitness.

Developments in the United States were similar. In 1821 Vermont passed the country's first statute prohibiting the publication or distribution of obscene materials. By the mid-1800s, production and distribution of obscenity was a crime throughout most of the United States. And in this country, as in Great Britain, much of the clamor for enforcement came from private watchdog organizations.

Most prominent were the Watch and Ward Society in Boston and the New York Society for the Suppression of Vice.

New York grocer Anthony Comstock became the nation's best-known and most vigorous crusader against explicit sexual materials. He was largely responsible for the 1873 enactment of a strict federal postal law against mailing obscenity. Sometimes referred to as the Comstock Act, the law is still on the books in modified form.<sup>3</sup> Soon after the law's enactment, Comstock was appointed a special agent of the Post Office Department to help enforce the act. Shortly before his death in 1915, Comstock boasted that he had convicted more than 3,000 people on obscenity charges and had destroyed 160 tons of obscene materials, including hundreds of thousands of pictures and books.<sup>4</sup> In this climate of vigorous prosecution, sexually explicit materials were still produced, but they were indeed forced underground. Materials were no longer advertised or circulated openly.

## OBSCENITY AND THE CONSTITUTION

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By the early 1900s, obscenity prosecution had become too zealous. The fervor against sexual materials had overstepped reasonable bounds. Increasingly, prosecutions were aimed at mainstream books and films that contained substantial educational or artistic merit—not materials that were pornographic.

For example, in the late 1920s Mary Ware Dennett decided her two sons should have some basic sex education, but she wasn't satisfied with any of the publications available on that topic. She wrote a pamphlet and titled it "The Sex Side of Life." She gave copies to her sons and later had the pamphlet published. Dennett was prosecuted for mailing an obscene publication, found guilty by a jury, and fined \$300, even though the sole purpose of the booklet was educational.<sup>5</sup>

Even works of obvious literary merit by well-known writers were caught in the effort to rid society of smut. In 1927 Boston authorities notified booksellers that the further sale of two recently published books, *Elmer Gantry* by Sinclair Lewis and *An American Tragedy* by Theodore Dreiser, would be deemed grounds for obscenity prosecution. And in New York, the novel *Lady Chatterley's Lover* by D. H. Lawrence was held obscene by a trial court in 1944.<sup>6</sup>

In the late 1950s, the U.S. Supreme Court finally entered the fray. The Court began to closely scrutinize materials that had been pronounced obscene, and it employed the First Amendment as a safeguard against rash and sweeping judgments by government officials. In the 1957 case of *Roth v. United States*,<sup>7</sup> the Court laid the general foundation for today's approach to obscenity law. The approach is based on two main principles: First, the Court said in *Roth* that a category of sexual expression—called obscenity—is indeed without First Amendment protection. As a result, this kind of speech may be banned by the states and by the federal government. No compelling interest or any other

particular level of justification need be shown in order to punish this unprotected category of expression.

But the second key principle established by *Roth* is that the Court establishes the definition of obscenity—a definition born of constitutional principle—and ensures that the definition is properly applied. The Court in *Roth* went on to fashion a narrow definition for obscenity, limiting it to hard-core sexual material that is utterly without redeeming social value. Sexual expression that did not fit the strict definition was protected by the First Amendment and could not be banned. The constitutional definition, which has been modified by the Court since, led to a substantial curtailment of obscenity prosecutions throughout the country.

## THE RATIONALE FOR CONTROLS

Though the Supreme Court's approach prevented government sanctions against most sexual expression, some legal experts questioned whether the Court had sufficient justification to place *any* category of sexual material entirely outside the purview of the First Amendment. This was an exception to the usual balancing approach, in which some specific harm from expression must be identified before the First Amendment yields. But the Court has reiterated on many occasions that obscenity is categorically excluded from constitutional protection, even when the material is distributed only to a willing adult audience. One of the Court's most thorough defenses of the categorical obscenity exclusion came in *Paris Adult Theatre I v. Slaton*, a 5–4 decision against the First Amendment claims of two adult movie theaters in Atlanta. Wrote Chief Justice Warren Burger for the majority in the 1973 case:

[I]t is argued there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind of state regulation is "impermissible." We reject this argument. . . .

From the beginning of civilized societies, legislatures and judges have acted on various unprovable assumptions. . . .

The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.<sup>8</sup>

Not all Supreme Court justices have agreed with the categorical obscenity approach, however. In *Roth*, three justices dissented: two who thought that all sexually oriented expression should be protected, and one who thought the definition approach was impracticable. Justice William Brennan, who crafted

the majority opinion in *Roth*, had changed his mind by 1973. Brennan had come to view the Roth approach as unworkable and as a threat to personal liberty because, he became convinced, a definition could not be articulated with sufficient clarity to ensure fair and consistent application. Brennan explained his change of mind in a dissent to the *Paris Adult Theatre* case, in which he wrote: “Our experience with Roth requires us not only to abandon the effort to pick out obscene materials on a case-by-case basis, but also to reconsider a fundamental postulate of *Roth*: that there exists a definable class of sexually oriented expression that may be totally suppressed by the Federal and State governments.”<sup>9</sup>

## THE PRESIDENTIAL COMMISSIONS

Two presidential commissions have contributed to the debate over whether obscenity is harmful to society and whether it warrants prohibition. The first of these, called the President’s Commission on Obscenity and Pornography, was created in 1967 and issued its report in 1970. The commission spent \$2 million, sponsored some of its own research, and ultimately concluded there was no reliable evidence suggesting that exposure to explicit sexual materials was a cause of delinquent or criminal behavior. The commission therefore recommended that all legislation prohibiting the sale or distribution of sexual materials to consenting adults be repealed—a recommendation that was never followed. The commission did support continued prohibitions on public display and unsolicited mailing, however.

The second commission, called the Attorney General’s Commission on Pornography, was formed at the request of President Reagan in 1985 and issued its report a year later. Sometimes referred to as the Meese Commission after Attorney General Edwin Meese, this second commission had only a quarter the funding of the earlier commission. Its conclusions and recommendations were significantly different, too, and some critics charged that the Meese Commission was determined from the beginning to find pornography harmful. The commission conducted several public hearings, examined explicit films and magazines, visited adults-only bookstores, and consulted current research by social scientists. The commission concluded that exposure to sexually explicit materials that are violent or sexually degrading leads to more aggressive attitudes toward women and probably to a higher incidence of sexual violence. The commission therefore recommended that local, state, and federal prosecutors more zealously seek convictions for violators of obscenity laws, including laws against distribution to consenting adults.

## DEFINING OBSCENITY

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The debate over the wisdom of attempting to ban obscenity will surely continue. Constitutionally speaking, though, the Supreme Court has made it clear that such materials may be banned—if the materials truly meet the Court’s standard for obscenity. Constitutional rights may hinge entirely on the wording of the Court’s



obscenity definition and whether the definition was properly applied to the material in question. Appellate courts have been stuck with the time-consuming burden of reviewing sexually explicit material and determining whether juries had properly determined they were obscene.

The standard that the Court first began to articulate in *Roth* went through a period of some tinkering. Then in 1973 the Court finally settled on the definition it has used ever since. The current standard was stated in *Miller v. California*,<sup>10</sup> a case decided the same day as *Paris Adult Theatre*. Under what has come to be known as the **Miller test**, material may constitutionally be deemed obscene only if

1. The average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest.
2. The work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law.
3. The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

All three portions of this test must be proved in court before material can be labeled obscene, stripped of its constitutional protection, and punished.

## PRURIENT INTEREST

First a prosecutor must convince a judge or jury that the material in question was designed to appeal to a **prurient interest**. This means that the material was intended to excite lewd, lascivious, shameful, or morbid thoughts about sex. Material that provokes only normal, healthy sexual desires does not fall into this category.<sup>11</sup>

Distinguishing normal sexual desires from lewd, deviant ones has, of course, proved a somewhat confusing task. In making the determination, jurors are not simply to impose their own views but are to judge how the average person in that community would respond to the materials. Average person means adults who are neither the most prudish nor the most tolerant. The average person concept does not include children—unless they were the intended audience for the material.

In *Miller*, the Court concluded that the obscenity definition should accommodate varying community standards because

[O]ur nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation. . . .

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.<sup>12</sup>

As reasonable as this might sound, however, some constitutional experts have excoriated this approach. It is, critics say, the only place in constitutional law

where the protections of the Constitution may be allowably narrower in some parts of the country than in others. Geographically, anti-obscenity statutes may designate the applicable community to be the city, county, or state where the materials were distributed.

It is important to note that, although the community standards portion of the *Miller* test does allow for some degree of variation across the country, the discretion of juries is limited. Whether determining questions of prurient interest or patent offensiveness, juries do not necessarily have the final word. Trial judges and appellate courts are free to review juries' obscenity determinations and to overturn them if they are not limited to the narrow class of material that the Supreme Court actually had in mind. This was made abundantly clear by the Court in *Jenkins v. Georgia*, a case that will be discussed in the next section.

Finally, the prurient interest determination is to be made by considering the work as a whole. This means that a small, sexually oriented portion of a work may not be looked at in isolation when deciding the prurient interest question. Nor, on the other hand, would one page of political commentary protect a hundred-page picture book filled with shamefully graphic sex scenes. The overall tenor and intent of the work is the determining factor.

## PATENT OFFENSIVENESS

The second part of the *Miller* test serves to further clarify the first by requiring that any material deemed obscene must show or describe sexual conduct, and it must do so in a patently offensive manner. Furthermore, in order to be valid, obscenity statutes must specify the kinds of sexual content they intend to regulate. By way of example, the Supreme Court in *Miller* said that statutes could prohibit the following:

- Patently offensive representations or depictions of ultimate sexual acts, normal or perverted, actual or simulated
- Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals

In sum, the Supreme Court has applied the **patent offensiveness** part of the *Miller* test to limit obscenity to hard-core materials. Community standards may be considered when determining patent offensiveness. But in no case may a local judge or jury, under the guise of community standards, extend the obscenity definition to works other than the hard-core variety.

In *Jenkins v. Georgia*, decided a year after *Miller*, the Supreme Court reversed an obscenity conviction for showing the popular film *Carnal Knowledge*, starring Jack Nicholson, Art Garfunkel, Ann-Margret, and Candice Bergen. The movie was about two lifelong male friends and their troubled sex lives. Though the film contained occasional scenes of nudity and simulated sexual intercourse,

the actors' bodies were not the main focus of those scenes. At no time was there any exhibition of the actors' genitals, lewd or otherwise. The unanimous Court held that the movie plainly did not meet the *Miller* standard for obscenity, despite what the jury thought. Wrote Justice William Rehnquist for the majority:

Even though questions of “appeal to the prurient interest” or of patent offensiveness are “essentially questions of fact,” it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is “patently offensive.” . . . Appellant’s showing the film “Carnal Knowledge” is simply not the “public portrayal of hard core sexual conduct for its own sake, and for ensuing commercial gain” which we said was punishable in *Miller*.<sup>13</sup>

Thus for three decades the nation’s lower courts have been on notice that the *Miller* standard encompasses only hard-core representations of sexual conduct. Though citizens may complain to authorities and jurors may be offended, mere depictions of nudity or the use of some sexual terms, for instance, cannot be deemed patently offensive under *Miller*.

Nearly all judicial declarations of obscenity under the *Miller* test have involved materials that were pictorial in nature. In rare instances, however, descriptions of sexual conduct by words alone—orally or in writing—can amount to obscenity. Soon after *Miller* was decided, the Supreme Court upheld an obscenity conviction based on the book titled *Suite 69*. The book had no pictures either on the cover or on the inside. But according to the Court, the prose consisted “entirely of repetitive descriptions of physical, sexual conduct, ‘clinically’ explicit and offensive to the point of being nauseous.”<sup>14</sup>

In 2006 the U.S. attorney in Pittsburgh bought obscenity charges against fifty-six-year-old Karen Fletcher and shut down her “Red Rose” website. On the site Fletcher posted short stories that described in detail the sexual abuse of very young children. The stories related to Fletcher’s own history of abuse and she considered them therapeutic to write, according to news accounts. The stories were seen by only the twenty-nine paying subscribers and contained no photos or other images. First Amendment lawyers regarded the cases as a good opportunity to test the limits of obscenity law. But the case never went to trial, as a plea agreement was reached in 2008.

## LACK OF SERIOUS VALUE

Material that appeals to a prurient interest through patently offensive representations of sexual conduct is still not obscene unless, taken as a whole, it lacks serious literary, artistic, political, or scientific value. This final part of the *Miller* test is to ensure that obscenity laws do not operate to deprive society of works that may honestly contribute to the marketplace of ideas.

This third part of the test, unlike the first two, is not determined with reference to local community standards. Art or literature experts, for example, may be called

in from distant parts of the country to explain to a jury the value of the material in question. The Supreme Court made this point clear in a 1987 case, *Pope v. Illinois*, in which the Court remanded the obscenity convictions of two clerks at adult bookstores. At the defendants' trials, the juries had been instructed that, under the third part of the *Miller* test, they must determine whether ordinary adults in the state of Illinois would believe that the magazines in question contained value. The Supreme Court ruled that the instruction was in error because, unlike the first two parts of the obscenity standard, literary, artistic, political, or scientific value is not to be determined in terms of contemporary community standards. "The proper inquiry," wrote Justice White for the majority, "is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material."<sup>15</sup> This final part of the *Miller* test is a national, reasonable-person standard.

Nevertheless, this serious value element has generated much difference of opinion and judicial inconsistency. *Penthouse* magazine will serve to illustrate. *Penthouse* is a slick men's magazine with a worldwide circulation of several million, and it is widely available in the United States. It is sometimes called soft-core pornography and considered in the same general category as *Playboy*—a magazine that the Meese Commission categorized as "plainly non-obscene."<sup>16</sup> However, a few courts have been convinced that *Penthouse* is distinctly more explicit, that its depictions are offensive enough to qualify as hard core under the second part of the *Miller* test. This determination has led to interesting judicial discussions about whether *Penthouse* also qualifies as obscene under the third part of the *Miller* test.

In 1980 the Supreme Court of Louisiana said no, that *Penthouse* was saved by the third part of the test. The case, *State v. Walden Book Co.*, involved a criminal proceeding against five booksellers in which the state sought to have the June 1980 issue of *Penthouse* declared obscene. The retailers chose to remove the publication from their shelves rather than contest the proceeding. But the magazine publisher intervened to counter the obscenity charge. The court agreed with the trial judge that the magazine appealed to the prurient interest and contained patently offensive depictions of sexual conduct. But the magazine wasn't obscene, the court held, because it contained serious political, scientific, and literary value.

The Louisiana court said that, under the third part of the *Miller* test, it was necessary to treat the whole magazine as a unit and to weigh those portions of the magazine that possess serious value against those that do not. Of the magazine's 228 pages, the court determined that 65 were full-page ads, 67 contained articles with serious value, and 96 contained material lacking serious value. Among the items with constitutionally sufficient value were an article about the U.S. banking industry and the Organization of Petroleum Exporting Countries, a critique of the volunteer army, an analysis of new cameras on the market, and a consumer report on a new car. "These articles are not a sham," the court said, but are

“of a kind frequently and traditionally found in periodicals of general interest.”<sup>17</sup> In a concurrent opinion, one justice wrote: “This [justice] regards restrictions by government of what type of literature our citizens may or may not read as the most obscene element in the case.”<sup>18</sup>

That same year, however, the federal Court of Appeals concluded that *Penthouse* magazine could be deemed obscene. The case, *Penthouse v. McAuliffe*,<sup>19</sup> arose after a Georgia sheriff’s obscenity enforcement program had convinced magazine retailers to pull both *Playboy* and *Penthouse* magazines from the shelves. The publishers sought a declaratory judgment, stating that their magazines were not obscene. The appellate court declared *Playboy* nonobscene under all three parts of the *Miller* test. But the court found *Penthouse* distinctly different. Rather summarily, the court concluded that the magazine appealed to the prurient interest. As to the second part of the *Miller* test, the court said photographs suggesting that a female model was engaged in masturbation were indeed patently offensive. Patently offensive descriptions of sexual conduct were also contained in the magazine’s letters from readers sections, the court said. The court’s opinion then focused on the final part of the *Miller* test.

The *McAuliffe* court stressed that the “taken as a whole” language from the *Miller* test is not quantitative, but instead requires an overall judgment about the publication’s editorial mission. Even though *Penthouse* contained articles of literary merit, the court said, these articles were overshadowed by the magazine’s many patently offensive descriptions of sexual conduct. It was a close call, the court acknowledged, but when taken as a whole, the magazine was not one of serious value.

The *McAuliffe* decision is a questionable one, in which the court found itself critiquing the comparative literary merit of articles in *Playboy* and *Penthouse*. And it should be noted that no criminal determination of obscenity has ever been upheld against *Penthouse*. (In *McAuliffe*, the court merely refused to grant the magazine’s request for an official declaration that it was not obscene.) However, these *Penthouse* cases do illustrate the difficulty courts face in applying the third part of the *Miller* standard, and the cases would seem to indicate that *Penthouse*, at least in some communities in 1980, represented the borderline between clearly protected speech and obscenity. This is not to say that anything more graphic than *Penthouse* magazine is necessarily obscene, however. Far from it. Judges and juries on many occasions have concluded that particular materials far more graphic than *Penthouse*—including videotapes that boastfully label themselves “XXX-rated”—were not obscene.

Now consider the chapter Hypothetical in light of the *Miller* test. The commercial for Passion condoms did depict sexual activity to some extent, and that is one key ingredient of obscenity. It is highly unlikely, however, that the ads as described could be deemed to cater to a prurient, shameful interest. And even with the quick glimpse of a condom-covered penis, this fact alone would not

bring the ads into line with the kinds of materials that have been declared hard core and patently offensive.

## EXCEPTION: CHILD PORNOGRAPHY

Though the *Miller* test is now well established as the dividing line between sexual expression that may be banned and that which is protected, an important exception exists. The Supreme Court held in the 1982 case of *New York v. Ferber*<sup>20</sup> that government may prohibit the dissemination of child pornography—material showing children engaged in sexual conduct—regardless of whether the material is obscene according to *Miller*.

The Court acknowledged that laws against child pornography, like obscenity statutes, run the risk of suppressing protected speech by becoming too heavy handed. Nevertheless, the Court said states are entitled to greater leeway when combating pornographic depictions of children. This is because the use of juveniles as pornography subjects is intrinsically related to the sexual abuse of children, the Court said, and government's interest in safeguarding the physical and mental well-being of children is compelling. Whether the work appeals to the prurient interest bears no connection to the real issue—direct harm to children. Likewise, the other two parts of the *Miller* formulation are also irrelevant in these cases, the Court ruled.

As a result, statutes banning child pornography need not limit their reach to obscene materials under the *Miller* standard. A federal statute, for example, makes it a crime for any person to induce a minor to “engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct.” A first offense is punishable by a fine of as much as \$100,000 or ten years in prison, or both.<sup>21</sup> The federal statute is limited to instances in which visual materials are intended for distribution by mail or other means of interstate or foreign commerce, but states have similar criminal prohibitions that apply to local distribution of child pornography. The constitutionality of these federal and state statutes has been upheld by federal courts on several occasions.

Still, there are constitutional limits. With the Child Pornography Prevention Act of 1996, Congress expanded federal law to ban computer-generated images that merely “appear to be” of children engaged in sexual conduct. This was a new twist. Prior child pornography laws had always sought to prevent harm to real children used in the creation of explicit images. But the theory was that child pornography, real as well as virtual, may provoke activity by child molesters. This portion of the statute was challenged and, in 2002, the U.S. Supreme Court declared the virtual pornography sections unconstitutional.

Writing for the Court's 6–3 majority in *Ashcroft v. Free Speech Coalition*, Justice Anthony Kennedy said the statute “prohibits speech that records no crime and creates no victims by its production.” Therefore, the *Ferber* precedent did not

apply, and this federal statute could be upheld only if it met the rigors of the *Miller* test. This it could not do. “Congress may pass valid laws to protect children from abuse, and it has. The prospect of crime, however, by itself does not justify laws suppressing protected speech,”<sup>22</sup> Justice Kennedy wrote. About a dozen states had passed similar laws against virtual child pornography that became constitutionally suspect with the Court’s ruling.

Following the *Ashcroft* ruling Congress enacted another, more narrow statute intended to combat instances where explicit material is promoted as containing children but where, through the use of image-altering software, it is virtually impossible for authorities to *prove* that minors were used. The statute, known as the PROTECT Act, makes it a crime to advertise that any material depicts minors engaged in sexually explicit conduct, whether or not the material contains real children or “virtual” images that look like children. This time the Supreme Court upheld the statute, in the 2008 case of *U.S. v. Williams*.<sup>23</sup>

## ATTACKING OBSCENITY

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The *Miller* test is at the core of American obscenity law. Yet, as important—and perplexing—as that constitutionally based test may be, it is only the first step toward understanding the complicated matter of actually prosecuting and otherwise curbing obscenity in the United States. *Miller* determines which expression may be prohibited. It does not demand such intervention, however. It is up to the various government jurisdictions to enact and enforce their own obscenity laws. These laws may not prohibit speech in more sweeping terms than *Miller* allows. In addition, individuals may be prosecuted only in accord with certain procedural safeguards in addition to those directly provided by the narrow obscenity definition.

### STATE STATUTES

The vigor of obscenity law enforcement varies significantly in states, counties, and cities. For the most part, this deviation is due to differences in resources and enforcement priorities, not to differences in the wording of obscenity laws. Most states have statutes that define obscenity pursuant to *Miller* and make it a crime to produce, distribute, sell, or exhibit such materials. The Texas statute, which is fairly typical, is reproduced in Exhibit 11.1.

These state statutes authorize a range of punishments for obscenity violations, with the strongest penalties reserved for repeat offenders and for those engaged in ambitious commercial obscenity operations. For example, distributing an obscene videotape to acquaintances in a college dorm typically would qualify as a misdemeanor, punishable by a fine of perhaps \$1,000 and/or up to six months

**EXHIBIT 11.1** *From the Texas Penal Code***§ 43.21. Definitions**

"Obscene" means material or a performance that:

- (A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;
  - (B) depicts or describes:
    - (i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, and sexual bestiality; or
    - (ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state, or a device designed and marketed as useful primarily for stimulation of the human genital organs; and
  - (C) taken as a whole, lacks serious literary, artistic, political, and scientific value.
- 

**§ 43.23. Obscenity**

- (a) A person commits an offense if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device.
- (b) An offense under Subsection (a) of this section is a felony of the third degree.
- (c) A person commits an offense if, knowing its content and character, he:
  - (1) promotes or possesses with intent to promote any obscene material or obscene device; or
  - (2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.
- (d) An offense under Subsection (c) of this section is a Class A misdemeanor.

in jail. On the other hand, commercial importation of large quantities of obscene tapes and publications would qualify in many states as a felony, punishable by hefty fines and/or several years in state prison.

Because local prosecutors often are burdened with more serious, violent crimes to prosecute, and because obscenity convictions can be difficult to obtain, obscenity arrests and trials are infrequent in many jurisdictions. In its 1986 report, the Meese Commission concluded that anti-obscenity statutes generally were adequate but that enforcement was lax. Except in instances of child pornography, the commission said prosecuting obscenity cases was apparently regarded as a low priority by law enforcement personnel. And when convictions were obtained, sentencing typically was light. The commission reported that courts tend to impose only small fines and unsupervised probation, even though the statutes permit harsher sentencing, because "to a significant extent, those involved in the sentencing process tend not to perceive obscenity violations as serious crimes."<sup>24</sup> But this is not to say convictions are rare or that obscenity peddlers have nothing to worry about.



## EXHIBIT 11.2 Oregon's Different Approach

The fact that the U.S. Constitution is interpreted not to provide protection for *Miller*-type obscenity doesn't preclude broader protection for sexual expression under state constitutions. In 1987 the Supreme Court of Oregon turned that state in a unique direction when it ruled that, under the Oregon Constitution, obscenity is protected expression.

In the case of *State v. Henry*,\* the owner of an adult bookstore argued that Oregon's obscenity statute was inconsistent with the state constitutional provision that "no law shall be passed . . . restricting the right to [express oneself] freely on any subject whatever." Oregon's high court, the final authority on the state constitution, agreed on historical grounds and invalidated the statute. The court noted that the Oregon Constitution's free speech guarantee is worded even more forcefully than the First Amendment, and the court said exceptions are strictly limited to classes of speech—such as perjury—that were prohibited by law at the time the constitution was adopted. Sexual expression, the court concluded, was not among the historical prohibitions. On the contrary, it is the kind of expression that framers of the federal and state constitutions probably intended to protect.

"The problem with the United States Supreme Court's approach to obscene expression," wrote the Oregon court, "is that it permits government to decide what constitutes socially acceptable expression, which is precisely what [James] Madison decried." The court noted that the very purpose of free speech guarantees is to protect expression that *fails* to conform to community standards. "We hold," the court concluded, "that characterizing expression as 'obscenity' under any definition, be it *Roth*, *Miller* or otherwise, does not deprive it of protection under the Constitution."\*\*

\**State v. Henry*, 732 P.2d 9 (Or. 1987).

\*\**Henry*, 17.

Several states do not have obscenity statutes, however. They may have a variety of laws on the books prohibiting harm to children, lewd conduct, and the like, but they do not have general anti-obscenity statutes that define and criminally punish a class of unprotected sexual expression. Oregon's approach is highlighted in Exhibit 11.2.

## FEDERAL STATUTES

This country operates under a dual system of criminal law, and that holds true in the field of obscenity: Both the states and the federal government have statutory prohibitions against obscenity. The federal government's enforcement role has been major or minor, depending on the administration in office and its sense of priorities. The Reagan administration and Attorney General Edwin Meese made obscenity eradication a priority in the 1980s. But for more than a decade thereafter, obscenity seemed a relatively minor concern for federal law enforcement. In 2005, however, Congress began funding, and the Bush administration began organizing, a new obscenity initiative. In that year obscenity-law enforcement was described as a high priority of Attorney General Alberto R. Gonzales, and the FBI field office in Washington, D.C., began recruiting for a dedicated anti-obscenity squad.

The *United States Code* contains almost thirty sections and subsections pertaining to obscenity. Among them are the following:

- It is a federal crime to knowingly use the mail to send obscene material, to import it into the United States, or to transport it between states by any method.<sup>25</sup>
- It is a crime to transmit obscene material by broadcast or by cable television.<sup>26</sup>
- Customs officers are authorized to seize any apparently obscene materials being imported into the United States and hold them until a District Court judgment is obtained.<sup>27</sup>
- It is unlawful to make obscene communications by means of the telephone for a commercial purpose.<sup>28</sup>

Title 18 of the federal Code also contains several sections that specify potent civil remedies and criminal penalties—including devastating property forfeitures—against racketeer-influenced and corrupt organizations. This cluster of statutes, aimed at organized crime and known cumulatively as the RICO Act, has been used against organizations with a track record of peddling obscenity.

For example, in a 1990 case against a husband and wife and their chain of bookstores and video rental stores in northern Virginia, a jury found obscene six magazines and four videotapes distributed by the company. But the conviction was not limited to a basic violation of the federal statute against interstate obscenity distribution. The defendants were also convicted of participating in a pattern of racketeering activity under the RICO Act, based on these and fifteen prior obscenity convictions. This allowed much harsher punishment, including complete forfeiture of all shares of stock in the corporation, as well as forfeiture of corporate assets, real estate, and motor vehicles—any property that supported the defendants in the conduct of their business or was derived from the business proceeds. U.S. marshals immediately padlocked the doors of the shops, and the forfeiture included books and magazines that were not obscene and would otherwise be constitutionally protected.

Nevertheless, the Court of Appeals held that the sweeping forfeitures did not violate the First Amendment. Obscenity is listed as one of the offenses that constitute racketeering activity. The court therefore reasoned:

The defendants may not launder their money derived from racketeering activities by investing it in bookstores, videos, magazines and other publications. The First Amendment may be used as a shield, but it is not a shield for criminal activity.

To follow the defendants' argument would allow criminals to protect their loot by investing it in newspapers, magazines, radio and television stations. Carried to its logical end, this reasoning would allow the Colombian drug lords to protect their enormous profits by purchasing the *New York Times* or the Columbia Broadcasting System.<sup>29</sup>

Some states have enacted their own RICO statutes and, following the federal model, have listed obscenity violations among the predicate offenses—along with drug offenses, extortion, and other offenses often associated with organized crime. The U.S. Supreme Court in 1989 upheld the application of Indiana’s RICO statute to obscenity violations, holding that the harsher RICO punishments were not an unconstitutional deterrent to protected speech. However, the Court also held that seizure of a place of business and all its contents is unconstitutional unless there has first been an adversarial hearing to determine that there was indeed an obscenity violation. A seizure cannot be accomplished under a RICO statute merely on probable cause that obscenity violations had occurred.<sup>30</sup>

## THE KNOWLEDGE REQUIREMENT

In order to be constitutional, obscenity statutes must contain a requirement of guilty knowledge on the part of the violator. This mirrors a principle that applies throughout criminal law. It means that in order to convict a defendant, it must be shown that he was aware of the actions that led to the violation. In the law this requisite degree of criminal knowledge is called **scienter**.

The obscenity defendant need not have known that the material in question actually violated the statute. Ignorance of the law is not a defense. But it is necessary that the defendant at least had knowledge of the general nature of the material. For example, suppose a video store owner were prosecuted because one videotape stocked in the store was believed to be obscene by local authorities. To obtain a conviction, the prosecutor would have to convince the jury—beyond a reasonable doubt—that the defendant was aware of the sexually explicit and offensive nature of the tape. It would be a complete defense for the store owner if he had ordered the tape by its nondescript title and had never personally viewed it or otherwise become aware of its hard-core contents.

Scienter may be proved by circumstantial evidence, however. In a 1988 case, the Court of Appeals of Texas upheld the conviction of an adult bookstore clerk who had sold a magazine to an undercover police officer. The magazine cover depicted a woman performing oral sodomy on a man, while another man was having sexual intercourse with her. The magazine was sealed with a sticker stating that “this literary material has been sealed prior to the exhibition for sale of this literary material. . . . The clerk who has sold this material has exhibited no knowledge of the contents of this literary material. . . .” The court said the sexually explicit cover, along with the fact that the clerk was surrounded in the shop by rows of magazines with similar covers, was sufficient evidence to conclude that the defendant was indeed aware of the nature of the material.<sup>31</sup>

In a more difficult case, a Texas appellate court upheld the conviction of an adult book and video store manager whose routine was simply to arrive at the store to collect the day’s receipts and then leave. The court said the jury could indeed

have found scienter beyond a reasonable doubt because (1) the manager, even in those brief visits, could not have missed seeing near the cash register the shelves of videotapes with highly explicit pictures on the boxes, and (2) the manager had written a memo instructing store clerks on how to deal with vice officers, thereby suggesting that he was aware the operation was possibly illegal.<sup>32</sup>

## PRIVATE POSSESSION

Despite the unqualified declarations in many Supreme Court cases that obscenity is not protected by the First Amendment, those cases have invariably dealt with some aspect of obscenity distribution. The matter of private possession was squarely considered by the Court in the 1969 case of *Stanley v. Georgia*.<sup>33</sup> And in that case the Court held that the mere private possession of obscenity cannot constitutionally be made a crime.

The case arose when police entered the defendant's home with a search warrant to look for evidence of an illegal gambling business. In his bedroom they found three reels of film, which the police viewed and deemed to be obscene. The defendant was convicted under Georgia law for possession of obscene matter, but the Supreme Court reversed. With private possession alone as the issue, the Court found a different set of interests than in other obscenity cases. The defendant had asserted a constitutional right to read or observe what he pleased in the privacy of his own home and to be free from the threat of state inquiry into the contents of his library. The state's asserted interest was essentially to protect the defendant's mind—to control the moral content of his thoughts—and the Court ruled this mission inconsistent with the First Amendment.

*Stanley v. Georgia* represents an intriguing departure from the Supreme Court's usual vein of pronouncements on obscenity. It means that technically speaking, obscenity does indeed have some constitutional protection. As a practical matter, however, the case has proved to be of limited importance. Later Supreme Court cases have made it clear that the *Stanley* exception is strictly limited to possession in the home. Mailing, importation, or interstate transportation of obscenity, even though for the sole purpose of private use, may be prohibited.<sup>34</sup> Furthermore, even home possession is not protected when the material in question is child pornography. The Supreme Court ruled in 1990 that government could punish the mere private possession of photographs showing children in sexually explicit poses.<sup>35</sup>

## PRIOR RESTRAINT

In *Near v. Minnesota*, the landmark 1931 case that established the general doctrine against prior restraint (discussed in Chapter 2), the Supreme Court listed a few exceptional kinds of cases in which prior restraint would be allowable. One was

enforcement against obscenity. In practice, obscenity prosecutions typically are initiated only after the material in question has been distributed or exhibited in the marketplace, thus giving rise to complaints. However, prior restraints against obscenity do have a long tradition, particularly with respect to motion pictures and use of the mail, and censorship is acceptable as long as certain procedural safeguards are followed.

### ***Motion Picture Censorship***

In 1915 the Supreme Court took the position that a state could require distributors of films to submit them to a government agency for approval prior to exhibition. This procedure was constitutional, the Court said, because motion pictures were merely entertainment for profit and were not protected by the First Amendment.<sup>36</sup> In the aftermath of this decision, such censorship became widespread in the United States, typically through local film review boards.

In a 1952 case the Court reversed its constitutional stance on films, stating that “motion pictures are a significant medium for the communication of ideas.”<sup>37</sup> The Court declared films to be protected by the First Amendment, and it held unconstitutional a New York law that had authorized the banning of “sacrilegious” movies. However, the Court specifically left open the possibility that obscene films could be censored if the action was taken in accordance with a properly drafted law.

Then in 1965, in *Freedman v. Maryland*,<sup>38</sup> the Court described the procedural safeguards necessary in order for censorship of obscene films to pass constitutional muster. First, the burden of proving whether the film is obscene must rest with the censor, not the exhibitor. Second, the system must provide for a prompt judicial review of any preliminary restraint to make sure it is based on probable obscenity. Finally, a restraint of indefinite duration may be based only on a final judicial determination that the film is actually obscene.

In *Freedman*, the Court struck down the Maryland censorship scheme for its failure to incorporate these safeguards. Under the Maryland law, a motion picture exhibitor had to first obtain a license for each film by submitting it to the state Board of Censors. If the license was denied, the burden was placed on the exhibitor to initiate a court proceeding to challenge the board’s ruling. Obtaining the judicial review could take months, and meanwhile exhibition of the film—which might ultimately be ruled nonobscene—was prohibited. Thus the Maryland procedure lacked all the required safeguards and was constitutionally unacceptable.

Applying the *Freedman* standards again in 1980, the Supreme Court affirmed that a Texas public nuisance statute was unconstitutional. In *Vance v. Universal Amusement Co.*,<sup>39</sup> a county attorney had decided to have an adults-only movie theater declared a public nuisance and to obtain an injunction to prevent the future showing of allegedly obscene films. A state statute specifically listed

exhibition of obscene material as one activity that could be enjoined as a nuisance. Texas argued that such a restraint is no more inhibitive than the criminal statutes against obscenity and that it is therefore constitutional. But the Supreme Court disagreed. Under the Texas procedure, the Court noted, a prior restraint of indefinite duration could be issued against films that had not been finally adjudicated to be obscene—which violates the third standard set in *Freedman*.

And a film exhibitor who decided to disobey the injunction presumably could be subject to contempt proceedings, even if the films ultimately were found to be nonobscene. A 5–4 majority of the Court therefore found the Texas approach too similar to the problem in *Freedman* and therefore held the statute unconstitutional.

## CURBING NONOBSCENE MATERIAL

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One of the basic principles explained in this chapter has been that, unless a court finds that it fits the legal definition of obscenity, sexual expression enjoys First Amendment protection and cannot be banned. However, as discussed in Chapter 2, even protected expression sometimes may be controlled as to the time, place, or manner of its exhibition. Such attempts are particularly common with respect to sexual expression.

### POSTAL CONTROLS

As noted under “Early American Obscenity Law,” the U.S. Post Office Department in the late 1800s and early 1900s engaged in a vigorous—even fanatic—campaign to confiscate pornographic materials from the mail. But that era has passed and, after the *Roth* decision of 1957, postal authorities’ ability to unilaterally withhold sex-oriented mailings was essentially restricted to materials that will be prosecuted as obscene. Furthermore, today’s Postal Service generally may not open and inspect first-class mail.

Congress, however, has passed two powerful laws designed to protect postal customers from receiving unsolicited sexual materials, while relieving the Postal Service of the role of censor. The laws, which took effect in 1970, apply to materials beyond those that would qualify as obscene. These federal statutes work as follows:

**39 U.S.C. § 3008** Under this statute, whoever mails any advertisement “which the *addressee in his sole discretion* believes to be erotically arousing or sexually provocative” is subject to a Postal Service order to refrain from any further mailings to that customer. The order to refrain from further mailings is sent at the postal customer’s request, without a government assessment of the material

in question. It is an effective way for individuals to ensure their removal from a particular company's mailing list.

**39 U.S.C. § 3010** This law allows individuals to register their names with the Postal Service, stating that they do not wish to receive any sexually oriented advertisements through the mail. The Postal Service compiles a reference list of these names and makes it available to mailers. Any mailer who sends such advertisements to a person whose name has been listed for thirty days violates the law. Sexually oriented advertisement is defined as any ad that depicts or explicitly describes in a predominantly sexual context human genitalia, any act of natural or unnatural sexual intercourse, any act of sadism or masochism, or any other erotic subject directly related to the foregoing.

Unlike section 3008, section 3010 is a potentially effective screen against initial mailings from any company. It is not necessary that the mail patron first receive an objectionable advertisement. On the other hand, section 3010 is more restricted in the sense that it applies only to mailings that meet the statutory definition of sexually oriented advertisement.

Sections 3008 and 3010 can work to prevent companies from mailing not only obscenity but also constitutionally protected material to particular individuals, and the statutes cause these companies the additional headache of having to constantly update mailing lists under force of law. Nevertheless, because postal customers, not government officials, make the decision to block mailings, the laws have been held constitutional. Mailers have no First Amendment right to communicate through private mailboxes to unwilling recipients, the courts have held.<sup>40</sup>

## LOCAL ZONING

In many instances community disgust over sexual expression is prompted not so much by the existence of any particular content as it is by the nature of establishments in which such materials are commonly sold. Businesses specializing in adult materials and entertainment—bookstores, video shops, topless stage shows, and the like—are in some communities associated with garish lights and offensively explicit signs and displays. Case-by-case prosecution for alleged obscenity is not likely the answer for neighborhoods concerned about maintaining an attractive environment. For this purpose, many communities have relied on zoning.

Local zoning ordinances have been used to control establishments for sex-oriented expression in several ways. One of these is location. Some communities have enacted zoning laws that attempt to disperse pornography outlets by prohibiting their location within a specified distance of one another. The theory behind dispersal zoning is that if adult businesses are scattered around town, no one neighborhood will suffer from a concentration of them. Other communities have taken the opposite approach, allowing adult businesses to locate only in designated business districts.



### Can It Be Suppressed?

- Does the material in question meet the *Miller* test for obscenity?
  - Is it designed to excite lewd, shameful, deviant thoughts of sex?
  - Is it patently offensive—a hard-core depiction of sex, far beyond customary limits of candor?
  - Does it lack serious value?
- Does an applicable statute outlaw this class of expression?
- If the material cannot be prosecuted as obscenity, is distribution nevertheless controlled by a valid time/place/manner restriction?

Zoning laws are also used to regulate the way in which adult businesses operate and how they look to passersby. For example, an ordinance might specify that sexually explicit pictures may not be displayed on the exterior of adult businesses. Some communities also require that certain kinds of adult businesses obtain conditional use permits before they begin operation. This is a potentially heavy-handed zoning technique in which an adult business, in order to qualify for location within a certain zone, must first agree to abide by established operating criteria. These criteria might include the size of the establishment and hours of operation.

In all cases, zoning ordinances describe the adult businesses they regulate in terms broader than the *Miller* definition of obscenity. This, after all, is central to the idea of regulation through zoning—to exert some control over establishments that specialize in explicit sexual expression without having to prosecute particular materials as obscene. Of course, to the extent that zoning ordinances affect expression beyond the legally obscene, they also raise serious First Amendment concerns.

### Renton v. Playtime Theatres

In a highly controversial 1986 case, *City of Renton v. Playtime Theatres, Inc.*,<sup>41</sup> the U.S. Supreme Court used a time/place/manner analysis to uphold a zoning regulation pertaining to the location of adult establishments. To be valid as a time/place/manner regulation, you may recall, a restriction must be content-neutral, must serve a substantial government interest, and must allow alternate avenues of communication.

The owners of two theaters in Renton, Washington, wanted to exhibit explicit adult films. They were stymied, however, by a zoning ordinance that prohibited adult movie theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The theater owners sued, seeking a declaratory judgment that the ordinance was too restrictive and violated their First Amendment rights.



Writing for the majority, Justice Rehnquist acknowledged that the Renton ordinance did not fit neatly into the content-neutral category because the law treated theaters specializing in adult movies differently from other theaters. Nevertheless, the ordinance still qualified as content-neutral, he said, because it was aimed not at the content of films shown in adult theaters but at the “secondary effects” of such theaters on the surrounding community. The ordinance by its terms was designed to prevent crime, protect the city’s retail trade, maintain property values, and generally protect the quality of neighborhood life, not to suppress the expression of unpopular views, Rehnquist wrote.

These aims also qualified as a substantial government interest. And even though the city of Renton apparently had not experienced any problems related to adult theaters, it was justified in relying on the experiences of other cities when it determined that the restrictions were needed. Finally, as to reasonable alternative avenues of communication, the Court said the ordinance left more than 5 percent of the city’s land area open for use as adult theater sites. This was sufficient, the Court concluded.

Justice Brennan wrote a lengthy dissent in *Renton*, arguing that the ordinance was not properly categorized as content-neutral. And even if it were, Brennan wrote, he still would have ruled it unconstitutional. In Brennan’s view, the law was overly restrictive as to theater sites and was too speculative concerning the problems adult theaters would induce.

### ***Secondary-Effects Doctrine***

It would be difficult to overstate the significance—and the questionable expansion—of the harmful-secondary-effects doctrine in the decades since *Renton*. Though *Renton* concerned a traditional zoning issue (the location of a business), cities across the country have used the secondary-effects justification to craft ordinance provisions that more directly regulate expression. These provisions include, for example, what percentage of a retailer’s video racks can be “adult” and by how many feet stages must be separated from patrons. Furthermore, many communities, following Justice Rehnquist’s invitation in *Renton*, have taken considerable liberty in *assuming* the harmful secondary effects upon which such ordinances are based.

*Renton* gave cities considerable latitude to use their zoning power to control adult expression. But exactly how much deference should be given to local government officials? For many years, courts across the country have struggled to identify the constitutional boundaries of the secondary-effects rationale, often reaching seemingly contradictory conclusions. Even the Supreme Court has occasionally had to reenter the fray.

For example: In 1995 the owners of two adjacent and complimentary adult bookstores sued the City of Los Angeles to enjoin enforcement of an ordinance

that prohibited the combined operation of multiple adult businesses in the same building. The ordinance was enacted allegedly to reduce criminal activity associated with the operation of such businesses. Plaintiffs argued the ordinance would force their businesses to close, in violation of their First Amendment rights. Plaintiffs won a summary judgment in the federal district court, and they prevailed again in the Ninth Circuit. But a fractured U.S. Supreme Court reversed, saying the city had met its initial burden of showing that it enacted a secondary-effects-based law. The Court provided some guidance on the factual inquiry to follow and remanded to the trial court. Then in 2008, about thirteen years after the plaintiffs first sought legal relief, the district court in *Alameda Books v. City of Los Angeles* again ruled in favor of the plaintiffs and effectively invalidated the L.A. ordinance. The court held that the bookstores presented sufficient evidence that the city's intent was to reduce any harmful secondary effects by forcing some businesses to close—that is, aiming at the protected First Amendment activity—rather than combating harmful effects directly. The city failed to rebut the plaintiffs with any substantial evidence to justify the ordinance, the district court said.<sup>42</sup>

## FUNDING CONDITIONS

In 1989, highly controversial photographs appeared in art exhibits funded by the National Endowment for the Arts (NEA), a federal agency that awards grants to artists, studios, and art museums. A grant had been used to fund an exhibit of photographs by the late Robert Mapplethorpe, and several of the photos contained explicit sexual poses with homosexual themes. In response to the resulting public outcry, Congress passed an amendment to the NEA's 1990 reauthorization bill, directing the NEA to ensure that “artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”<sup>43</sup>

Four performance artists who were later denied funding then filed a lawsuit, alleging their applications were rejected on political grounds in violation of their First Amendment rights; they challenged the decency provision. But the U.S. Supreme Court upheld the statute in 1998. Justice O'Connor, writing for the 8–1 majority in *National Endowment v. Finley*,<sup>44</sup> emphasized that the statute only requires that the NEA consider decency notions in the grant-awarding process; it doesn't categorically prohibit awards to projects that many would deem indecent. Furthermore, though the terms may be vague, O'Connor noted, this is not a criminal statute involving punishment. It merely requires the NEA to consider certain factors in its decisions to award public dollars, and this doesn't interfere with First Amendment rights. Congress has wide latitude to set spending priorities and to allocate funding according to criteria, the Court said.

## WOMEN'S RIGHTS

Various jurisdictions have attempted to curb sexually explicit materials beyond those that are obscene by declaring such materials a violation of women's civil rights and in some cases providing for civil lawsuits against the distributors. These efforts have not been successful, however. The leading case is *American Booksellers Association v. Hudnut*, a Court of Appeals decision from 1985. The case involved an Indianapolis ordinance that declared pornography a form of illegal discrimination against women. Pornography was defined broadly under the ordinance as "the graphic sexually explicit subordination of women, whether in pictures or in words," that also includes depictions of women in any of several enumerated degrading roles.<sup>45</sup> The ordinance prohibited trafficking in such pornography, and it gave anyone injured by someone who had seen or read pornography a right to sue the maker or seller. The ordinance did not limit its scope to patently offensive materials or to materials lacking in serious value or to expression that panders to a prurient interest. Thus the ordinance concerned a potentially much wider range of material than that which would qualify as obscene. Several retail book and video stores and bookstore and publishing associations challenged the ordinance.

The Court of Appeals declared that "we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape in the streets."<sup>46</sup> But this was not enough to save the ordinance. The court noted that almost any kind of speech, from popular TV programs to religious teaching, may have some negative effect on individuals or society. That is no justification to ban the speech, however. In declaring the ordinance a blatant infringement on protected speech, the court said: "Under the First Amendment the government must leave to the people the evaluation of ideas," and there exists "an absolute right to propagate opinions that the government finds wrong or even hateful."<sup>47</sup>

## CAMPAIGNS AGAINST ADVERTISING

Sometimes adult-oriented advertising content irks community residents and public officials. As a general rule, private citizens may exercise their own First Amendment rights to speak out against such content and urge the media to shun certain types of advertising, but as we learned in Chapter 2, government officials must be more careful. They may not to engage in a campaign to intimidate the media and chill protected expression.

An example: CityBeat, a free, weekly newspaper in Ohio, ran various adult-services ads in its classified section. A group called Citizens for Community Values (CCV) organized a public campaign that aimed to pressure CityBeat into dropping the adult-themed ads. The campaign began with a news conference and

a demand letter signed by about forty clergymen, civic leaders, and city and county officials such as the Hamilton County sheriff and a Cincinnati city councilman.

CityBeat responded in 2008 with a lawsuit against CCV and all those who endorsed the letter, seeking an injunction against similar pressure tactics, damages for lost advertising, and attorney's fees. CityBeat's complaint filing noted that the paper's policy was to "accept advertisements of all content and genres, excepting only those ads that would themselves be unlawful." The involvement of public officials, CityBeat said, turned the entire campaign into a form of illegal government intimidation, and the paper charged all participants with conspiring to violate the First Amendment rights of a free press.<sup>48</sup>

## INDECENCY

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The broadcast spectrum is considered a scarce public resource, and broadcast licensees are therefore subject to greater content regulation, as discussed in chapters 9 and 10. Perhaps most starkly in the area of sexual expression, broadcasters are regulated to an extent that would be unthinkable in the print media or on the Internet. Although obscenity is rarely a concern for mainstream mass media in the United States, the stricter broadcast rules are a daily concern for some stations.

### THE PUBLIC AIRWAVES

Since 1927, federal law has prohibited the broadcast of obscene or indecent material. Today the ban is codified within the general criminal statutes as follows: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." Many broadcasters know this as 18 U.S.C. § 1464. But enforcement is not left entirely to prosecutions by the U.S. Justice Department. The Federal Communications Commission is specifically empowered by the 1934 Communications Act to penalize broadcasters who violate the statute.<sup>49</sup>

Though the statute is worded broadly, a long time passed before broadcasters and the FCC seriously tangled over obscene or indecent content. And even more years went by before a court challenge arose to determine the statute's constitutionality and the valid scope of FCC power in this area. From 1964 to 1974, the FCC investigated several radio programs in response to complaints from listeners and began groping for standards on where to draw the line. In a couple of instances, the commission levied fines against the broadcasters. One case involved the use of allegedly indecent words during an interview with a rock musician; the other case concerned blatant sexual innuendo during call-in talk shows of the topless radio genre. But both broadcasters paid their fines without

a court test of the critical First Amendment issue: May broadcasters be punished for content that is considered indecent but is not legally obscene?

In 1975, seeking to give broadcasters clearer notice and to distinguish the term from the *Miller* definition of obscenity, the FCC defined *indecent* as material that

describes or depicts, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, at times of day when there is a reasonable risk that children may be in the audience.<sup>50</sup>

The definition is significantly broader than that for obscenity: There is no requirement of appeal to prurient interest and no built-in protection for material that contains political or artistic value.

### ***Seven Dirty Words***

Finally in 1978, the Supreme Court issued a landmark ruling on the constitutionality of banning indecency. The case, *Federal Communications Commission v. Pacifica Foundation*, arose as follows: About two o'clock on a Tuesday afternoon, a New York radio station broadcast a recording of a twelve-minute monologue titled "Filthy Words," by satiric comedian George Carlin. The monologue focused on seven words which, by Carlin's own description, "you couldn't say on the public airwaves." In the monologue, taped before a live audience, Carlin listed the words and proceeded to repeat them, over and over again, demonstrating many phrases in which each is used. The words were *shit*, *piss*, *fuck*, *cunt*, *cocksucker*, *motherfucker*, and *tits*.

The monologue aired on the FM station during part of a larger discussion about society's attitude toward language. The station warned in advance that the recording included language that might offend listeners. Nevertheless, a man who apparently missed the warning heard a portion of the monologue while driving with his young son. He later wrote a complaint to the FCC, stating that although he could understand the "record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control."<sup>51</sup> About a year later, the FCC issued a declaratory order stating that the station owner, Pacifica Foundation, could have been subject to sanctions. No formal sanctions were actually imposed, but the order was placed in the station's license file for the FCC to consider in the event of any further complaints. Pacifica appealed to the courts.

The Supreme Court, in a 5–4 decision, upheld the FCC order. Even though the recording was not obscene and would be protected in other contexts, the Court said the FCC action in this particular case was justified for two reasons: First, broadcasting has a uniquely pervasive presence in Americans' lives. Patently offensive, indecent material presented over the airwaves confronts a person in

the privacy of the home, where the individual's right to be let alone outweighs the First Amendment rights of the intruder. And the Court said turning off the radio is no solution. Wrote Justice John Paul Stevens: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."<sup>52</sup>

The second and perhaps more important justification was that the broadcast program was uniquely accessible to children. "Pacifica's broadcast could have enlarged a child's vocabulary in an instant,"<sup>53</sup> Stevens said, before parents would have a reasonable opportunity to exercise control. Broadcasting cannot easily be monitored minute to minute, unlike media such as magazines, the Court said, which parents must deliberately bring into the home.

The Court majority in *Pacifica* emphasized that its ruling was a narrow one, resting on a nuisance rationale—a sort of time/place/manner restriction—in which context is all-important. The time of the day, the composition of the audience, and the content of the program in which the language appears are important variables that, in another case, could produce a different result, the Court noted.

### ***The Get-Tough Years***

Thus the FCC obtained a court victory in *Pacifica*, but a narrow one. For almost a decade following *Pacifica*, the FCC took a very limited approach to enforcing the indecency prohibition. The commission restricted its investigations to material broadcast before ten P.M., when significant numbers of children were most likely to be in the audience, and to programs that involved the repeated use of offensive words for their shock value. For several years not a single broadcast was held in violation of the law.

Then in 1987 the FCC adopted a new, get-tough standard. It ruled in three separate cases that radio broadcasts had violated the indecency prohibition, and formal warnings were issued to the stations. One broadcast consisted of excerpts from a play in which two homosexuals dying of AIDS discussed their sexual fantasies in telephone conversations. The second case, against a University of California campus radio station in Santa Barbara, concerned a song that contained several graphic references to sexual organs and activities. The third case involved *The Howard Stern Show*, which featured raunchy, sex-oriented humor in a call-in radio format.<sup>54</sup>

Two of the radio broadcasts had aired after ten P.M., the time period previously termed a **safe harbor**, when broadcasters could air adult-oriented programming without the threat of indecency sanctions. But the FCC had decided, rather offhandedly, to reduce the safe harbor to the period between midnight and six A.M.

In 1988 the FCC turned to television as well, ruling that a prime-time broadcast of the movie *Private Lessons* was indecent. The movie, aired on KZKC-TV in Kansas City, Missouri, was about a housekeeper's seduction of a fifteen-year-old boy, and it included scenes of frontal nudity and a sex-oriented theme.



### Is It Indecent?

- Does the material describe or depict sexual or excretory activities?
- Is the material patently offensive—as measured by modern community standards *for broadcast*?
- Did the material air during a time when children are likely to be in the audience, as opposed to the FCC’s safe harbor hours?

The FCC ruled that the explicit nudity and fondling and the overall emphasis on sexual activity were presented “in a pandering and titillating fashion,” and the commission voted to fine the station \$2,000.<sup>55</sup>

Meanwhile, Congress, too, had decided the time was right to clamp down on TV sex and raunchy radio humor. In 1988 it passed a statute ordering the FCC to enforce the anti-indecency law twenty-four hours a day. Thus Congress and the FCC had moved well beyond the narrow enforcement circumstances that the Supreme Court had approved in *Pacifica*. Clearly, it was time for the courts to make another constitutional assessment in the midst of the politically charged maneuvering over indecency.

In 1991 the federal Court of Appeals issued a predictable opinion on the twenty-four-hour ban in *Action for Children’s Television v. Federal Communications Commission*.<sup>56</sup> The court said broadcasts that are indecent but not obscene are protected by the First Amendment, and it interpreted *Pacifica* to mean that some kind of safe harbor for adult programming was constitutionally required. Therefore, the court struck down the twenty-four-hour ban. As to the expanse of the safe harbor, the court did not dictate particular hours. Rather, it directed the FCC to conduct a thorough research and hearing process and then to set reasonable safe harbor hours on the basis of solid audience data concerning children. Stated in terms of the constitutional standard, the restriction on protected indecent speech would be valid only if narrowly tailored to serve the compelling public interest in safeguarding children.

Based on additional data collected by the FCC, Congress included a section in the Public Telecommunications Act of 1992 stating that indecent material may be broadcast only between the hours of midnight and six A.M. An exception permitted public broadcast stations that go off the air at midnight to broadcast indecent material after ten P.M. In 1993 the FCC adopted regulations to implement the new statutory restriction on indecency. But the new statute and regulations were again challenged on the ground that they unconstitutionally infringed upon the First Amendment rights of adults.

In 1995, in another case named *Action for Children’s Television v. FCC*, a full panel of the Court of Appeals ruled that the FCC had demonstrated sufficiently

compelling justification for protecting children aged 17 and under against indecency up to midnight. Wrote the court:

The data on broadcasting that the FCC has collected reveal that large numbers of children view television or listen to the radio from the early morning until late in the evening, that those numbers decline rapidly as midnight approaches, and that a substantial portion of the adult audience is tuned into television or radio broadcasts after midnight. We find this information sufficient to support the safe harbor parameters that Congress has drawn.<sup>57</sup>

Thus the court held there was sufficient evidence to justify anti-indecency enforcement up to midnight, and it held the limited midnight-to-six A.M. safe harbor for indecency did not unduly burden the First Amendment rights of adult viewers and listeners.

Nevertheless, the court held the midnight safe harbor time unconstitutional because of the disparity built into the statute: For some stations, the safe harbor period began at ten P.M. The safe harbor distinction drawn by Congress between the two categories of broadcasters bore no apparent relationship to the compelling interest in protecting children, the court said. Therefore, the court ruled that all stations must be permitted to broadcast indecency beginning at ten P.M. as long as some stations are permitted to do so. As of 2009, the safe harbor for indecency remained ten P.M. to six A.M.

In another 1995 case, yet again named *Action for Children's Television v. FCC*,<sup>58</sup> the Court of Appeals upheld the FCC's multi-step procedure for imposing indecency forfeitures against broadcasters. Following this case, the FCC promptly moved forward on about one hundred pending indecency cases. In one case, the FCC announced a \$1.7 million settlement agreement with Infinity Broadcasting Corporation. The FCC had initiated proceedings against the company for airing allegedly indecent material during *The Howard Stern Show*. Infinity's first settlement installment of \$1 million was the largest amount ever paid to the U.S. Treasury by a broadcast licensee.

Another question about broadcast indecency prohibitions has been whether they would apply to the content of news programming. The FCC has never suggested that a blanket indecency exemption exists for news programs. Yet it is questionable whether the *Pacifica* balancing approach would permit punishment of legitimate news content, and the FCC has dismissed audience complaints against a handful of news programs.

For example, in 1989 National Public Radio's news program, *All Things Considered*, aired a segment on organized crime. The broadcast included portions of a tape-recorded phone conversation between an alleged mobster and an associate. During the conversation the words *fuck* and *fucking* were used ten times. A listener complained to the FCC that the tape, which had been presented as court evidence against the alleged mobster, was indecent for broadcast.



The FCC voted 4–1 that, in light of the legitimate news context, the broadcast was not patently offensive and thus not indecent.<sup>59</sup> Context, then, is a factor the FCC will consider before concluding that programming is indecent.

In 2001 the FCC issued a long-awaited document titled “Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency.”<sup>60</sup> The extensive document provided a history of FCC indecency policy and examples of allegedly indecent content so that broadcasters might better see where the FCC intended to draw the line. Some immediately criticized the guidelines, however, including a commentator for *Broadcasting and Cable* magazine, who wrote, “The FCC’s broadcast indecency standard remains today just what it was before the commission issued its guidance to the broadcast industry: clear as mud.”<sup>61</sup>

### ***Get-Tough Years, Again***

At the turn of the new millennium, FCC indecency proceedings had again become less frequent. Perhaps broadcast stations got the message that Congress and the FCC were serious about enforcement. Or perhaps the nation’s attention was focused on other, more pressing national and international issues. But in 2003 the debate over indecency started warming up again, and in 2004 broadcast indecency exploded into one of the hottest topics in communications law—and in politics.

A couple of high-profile events supplied the fuel. During a live televised awards show in 2003 the rock star Bono said, “This is really, really fucking brilliant.” The FCC staff concluded that, in context, it was not actionable indecency. But then came a one-second glimpse of singer Janet Jackson’s breast during the halftime show of the 2004 Super Bowl. Many viewers were outraged, and Congress and the FCC felt the pressure. The commission, reversing its own staff, decided that Bono’s fleeting expletive was indecent after all. And the commission, saying fleeting video glimpses could be punished, too, initiated a hefty \$550,000 forfeiture proceeding for the halftime mishap.

But the 2004 forfeiture proceeding with the most at stake was for a Fox Television show, *Married by America*, which depicted scenes from bachelor and bachelorette parties in Las Vegas. Though the private parts of strippers were obscured in the show, the FCC said the pixilation was not sufficient to diminish the blatantly sexual nature of the party scenes. Proposed forfeitures of \$7,000 for each Fox affiliate amounted to nearly \$1.2 million. Exhibit 11.3 shows one of the “notice of apparent liability” letters the FCC sent during the banner crack-down year of 2004.

Broadcasters involved in some of the 2004 proceedings vowed to fight the FCC rulings against them, leading to a few lengthy and expensive court battles. For example, the U.S. Court of Appeals for the Third Circuit in 2008 overturned the commission’s \$550,000 fine against CBS for the Super Bowl incident, saying

## EXHIBIT 11.3 Notice of Apparent Liability

### Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of )  
)  
)  
**AMFM RADIO**  
**LICENSES, L.L.C.** ) File No. EB-02-IH-0737  
) NAL/Acct. No. 200432080019  
Licensee of Station ) FRN #0001656586  
WIHT(FM), ) Facility ID # 25080  
Washington, D.C. )  
)

### NOTICE OF APPARENT LIABILITY FOR FORFEITURE

**Adopted: February 20, 2004 Released: June 10, 2004**

By the Commission: Commissioners Martin and Adelstein issuing separate statements; Commissioner Copps dissenting and issuing a statement.

#### I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("NAL"), we find that AMFM Radio Licenses, LLC ("AMFM"), licensee of Station WIHT(FM), Washington, D.C., apparently violated 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, by willfully broadcasting indecent language. Based upon our review of the facts and circumstances in this case, we conclude that AMFM is apparently liable for a monetary forfeiture in the amount of Twenty-Seven Thousand Five Hundred Dollars (\$27,500.00), the applicable statutory maximum.

#### II. BACKGROUND

2. The Commission received a complaint from listener Douglas Miller alleging that Station WIHT(FM) broadcast indecent material on September 17, 2002, between 9:30 and 9:45 A.M. The complainant alleged that the station aired a contest on its "Hot Morning Mess" program that invited listeners to predict how large a man's penis would become after applying a penile-enlargement device, and that the broadcast was inappropriate for airing during the morning hours. After reviewing the complaint, the staff issued a letter of inquiry to the licensee.
3. Clear Channel Communications, Inc. ("Clear Channel"), AMFM's corporate parent, submitted a response and included a compact disc containing the complained-of program material. In this regard, Clear Channel states that the material in question "likely aired" between the hours of 9:00 and 10:00 A.M. on September 17, 2002. Clear Channel argues that the subject matter and the language used in the complained-of broadcasts were not actionably indecent. Specifically, it contends that the material broadcast, in context, was not patently offensive as measured by contemporary community standards for the broadcast medium.

#### III. DISCUSSION

4. The Federal Communications Commission is authorized to license radio and television broadcast stations and is responsible for enforcing the Commission's rules and applicable statutory provisions concerning the operation of those stations. The Commission's role in overseeing program content is very limited, because any consideration of government action

against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment. In this regard, both the First Amendment to the United States Constitution and section 326 of the Act prohibit the Commission from censoring program material and from interfering with broadcasters' freedom of expression. Thus, the First Amendment is a critical constitutional limitation that demands that, in indecency determinations, we proceed cautiously and with appropriate restraint.

5. The Commission does, however, have the authority to enforce statutory and regulatory provisions restricting indecency and obscenity.

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7. The Commission defines indecent speech as language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.

Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.

Clear Channel does not dispute that it aired material describing or depicting a sexual organ. That material, therefore, warrants further scrutiny to determine whether or not it was patently offensive as measured by contemporary community standards for the broadcast medium.

8. In our assessment of whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically important." Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock. In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because "[e]ach indecency case presents its own particular mix of these, and possibly, other factors." In particular cases, the weight of one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent, or, alternatively, removing the broadcast material from the realm of indecency. In this case, we have examined all three factors and have determined that each weighs in favor of a finding that the broadcast material was patently offensive. We note that, in particular, the station's presentation of the material in a manner that was pandering, titillating, and shocking weighs heavily in our determination. . . .
9. With respect to the *Indecency Policy Statement's* first two factors, we find that the material dwelled on explicit and graphic descriptions of male genitalia. During the broadcasts, the "Hot Morning Mess" show personalities tested the "Pump Him Up" penile-enlargement device on a show sidekick, Tim "Teapot" Coburn, and discussed at length, and in specific detail, whether the product worked effectively in terms of adding length and girth to his penis. Specifically, the hosts

(continued)

**EXHIBIT 11.3 (continued)**

placed a microphone in the bathroom that Mr. Coburn occupied while attaching the device to, and testing the device on, his penis, thereby permitting the hosts to provide listeners with a running commentary of Mr. Coburn's efforts. The hosts also discussed at length how Mr. Coburn was to use a tape measure to determine the size of his penis and, at one point, the hosts invited listeners to call in and guess what Mr. Coburn's penile measurements would be after the pump's use. Although the word "penis" was not aired, various common euphemisms—some that could easily be understood by children—were used instead.

10. While we do not accept the argument that an isolated or fleeting broadcast could not be indecent, we need not reach that issue here because we find that the hosts' description of the use of a penile-enlargement device on a man's genitalia was prolonged. We similarly reject Clear Channel's contention that the hosts' discussions of male genitalia were vague and euphemistic, or, where more specific, factually necessary in the context of a "consumer report." In this case, the sexual import of the references, in context, was inescapable, and would clearly be understood by the listening audience and station callers to have been to the test subject's sexual organs. Moreover, the use of euphemism or innuendo is not a defense to a finding of indecency. We also reject Clear Channel's contention that this material cannot be found indecent because it was no more graphic or less graphic than material in cases where the former Mass Media Bureau did not take enforcement action. In support of this argument, Clear Channel cites an unpublished internal staff memorandum and unpublished staff decisions finding that certain material was not actionably indecent. Even if those cases could be deemed similar, to the extent that the staff may have erred by determining that the material in those cases was not indecent, these unpublished decisions are not binding on the Commission. That is particularly the case here, where published decisions, including those in the *Indecency Policy Statement*, provide guidance indicating that material such as that contained in this case is indecent.
11. The program hosts' repeated vulgar and lewd references to male genitalia, in the context of explicit discussions of sexual arousal and masturbation while using the penile-enlargement device, were pandering, titillating, or used to shock the listening audience. In contrast to Commission precedent where broadcasts were found not indecent because sexual organs or activities were discussed in a clinical, scientific or objective manner, the context of the instant broadcasts was clearly titillating. This is clear from the extensive sarcastic banter employed by the program hosts when discussing the test-subject's genitalia, which did not intend to make a serious or clinical report concerning sexual health issues. Moreover, the fact that the test-subject's resulting penile measurements, after use of the enlargement device, were made the subject of a call-in contest, belies any claim that the material was intended to be serious, clinical or instructional in nature. These references, in context, are similar to other material that has been found to be patently offensive. In this case, we find that the program hosts' extensive discussion of the penile enlargement device, and the size of the test-subject's genitalia, when discussed within the

context of a contest centering on guessing the size of a man's penis, to be patently offensive as measured by contemporary community standards for the broadcast medium. Accordingly, we find that AMFM apparently aired indecent material on September 17, 2002.

**IV. PROPOSED FORFEITURE**

12. Based on our review of the record in this case, we conclude that AMFM is apparently liable for the willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules, by airing indecent programming on WIHT(FM) on September 17, 2002. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$7,000 for transmission of indecent/obscene materials. The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." In this case, taking all of these factors into consideration, we find that AMFM is apparently liable for the maximum statutory forfeiture amount of \$27,500.00 for the broadcast of indecent material on September 17, 2002. In particular, there is a recent history of indecent broadcasts on stations controlled by Clear Channel Communications, Inc., AMFM's corporate parent, which justifies imposition of the maximum forfeiture amount. We reiterate our recent statement that multiple serious violations of our indecency rule by broadcasters may well lead to license revocation proceedings.
13. We also take this opportunity to note that we could have found AMFM to have engaged in apparent repeated violations. The statute prohibits the broadcast of indecent "utter[ances]." While the Commission has traditionally viewed all of the utterances in one program to be a single utterance and thus a single violation, such an approach is not legally required. Here, for example, there were several distinct passages and conversations, each of which could be viewed as a separate indecent utterance, and thus a separate violation. For purposes of this proceeding, we will use our traditional per-program approach. We hereby make clear that, in the future, we may treat situations like this as multiple, repeated violations with the accompanying increase in forfeitures.

**V. ORDERING CLAUSES**

14. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's rules, that AMFM Radio Licenses, L.L.C. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of Twenty-Seven Thousand Five Hundred dollars (\$27,500.00) for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

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FEDERAL COMMUNICATIONS COMMISSION

the FCC arbitrarily departed from its prior policy of not penalizing licensees for fleeting, unscripted content.<sup>62</sup> A year later the Supreme Court ordered the case back to the Third Circuit for further consideration. And as this book went to press, the case still was pending. The effect of this and other protracted court battles was to freeze the FCC at the very same time indecency complaints were pouring into the agency in record numbers. According to a *Wall Street Journal* report in 2009, the FCC had received some 820,000 indecency complaints in the previous three years.<sup>63</sup> This created a huge backlog, as the agency awaited the outcomes of court cases before dealing with the new complaints. Reflecting the increasingly political nature of indecency enforcement, many of the recent complaints were prompted by organized, file-a-complaint campaigns. For example, the American Family Association in 2009 launched a protest against one particular, homosexual-sex episode of “Family Guy” that aired on the Fox network, generating tens of thousands of indecency complaints to the FCC with a pre-worded, online complaint form.

### ***Fleeting Expletives***

As noted briefly in the preceding section, for years the FCC maintained a policy that fleeting, unscripted airings of otherwise indecent language or images would not be punished. Such material was assumed not to evidence pandering or intentionally shocking the audience, and therefore it was considered relatively innocent and inappropriate for punitive action. But in 2004 the commission changed course, saying that even fleeting, one-time use of vulgar words could be deemed illegally indecent, depending on context. The commission said that to categorically exempt such content would lead to more widespread use of vulgar words on the air and could harm children. The FCC also noted that new delay-switch technology made it easier to “bleep out” fleeting vulgarities.

The FCC then publicly notified Fox Television that two of its prior broadcasts, under the altered policy, were indecent. During Fox coverage of the 2002 Billboard Music Awards, singer Cher referred to critics with the words, “fuck ‘em.” And during coverage of the Billboard Awards a year later, TV actress Nicole Richie asked, “Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.” Though no fines were assessed, Fox filed a lawsuit alleging that the new policy was in violation of the First Amendment and it was an “arbitrary” and “capricious” action in violation of the Administrative Procedure Act that governs how federal agencies shall run. The Court of Appeals agreed with Fox on the administrative procedure argument, overturning the FCC’s judgment on grounds that the agency failed to provide adequate explanation for its change of policy. Exactly how did the new policy effectuate the indecency statute as well as or better than the old policy, the court wanted to know. The court did not rule on the First Amendment issue.

In 2009, however, the Supreme Court reversed. Ruling only on the procedural issue in *FCC v. Fox Television Stations*, the Court said the Second Circuit's review was too strict. Policy changes need no greater justification than is required to adopt a policy in the first place. The procedural requirement is only that the agency provide a "reasoned explanation for its action," the Court said. And the FCC's stated reasons for expanding the scope of indecency enforcement were indeed rational because even isolated utterances can be shocking and can constitute harmful first blows to children, the Court said.<sup>64</sup> The case was sent back to the Second Circuit for further deliberations and possibly for a ruling on Fox's First Amendment claim.

## CABLE TV

Nudity, coarse language, and explicit sexual scenes have been available through cable TV services to a greater extent than through broadcast TV. Predictably, many attempts have been made by Congress over the years to extend indecency restraints to cable TV. But the courts have consistently distinguished between cable TV and over-the-air, free broadcast TV. Courts have not extended the *Pacifica* doctrine to the cable medium and have struck down attempts to curtail anything broader than obscenity.

For example, in *Cruz v. Ferre* the Court of Appeals for the Eleventh Circuit held unconstitutional a Miami ordinance that sought to prohibit indecency on cable. In this 1985 case, the court noted that *Pacifica* rested on the double justification of broadcasting's pervasive presence and, more important, its accessibility to children. But in the cable medium, those justifications are diminished:

Cablevision does not "intrude" into the home. The Cablevision subscriber must affirmatively elect to have cable service come into his home. Additionally, the subscriber must make the additional affirmative decision whether to purchase any "extra" programming services, such as HBO. . . . The Supreme Court's reference to "a nuisance rationale" is not applicable to the Cablevision system, where there is no possibility that a noncable subscriber will be confronted with materials carried only on cable.<sup>65</sup>

And, as to the need to shield children:

Again parents must decide whether to allow Cablevision into the home. Parents decide whether to select supplementary programming services such as HBO. These services publish programming guides which identify programs containing "vulgarity," "nudity," and "violence." Additionally, parents may obtain a "lockbox" or "parental key" device enabling parents to prevent children from gaining access to "objectionable" channels of programming.<sup>66</sup>

More recently, the U.S. Supreme Court confirmed that indecency-based regulation for cable TV is different than for broadcast and requires a more skeptical

eye from the courts. At issue was section 505 of the Telecommunications Act, which attempted to shield basic cable subscribers from sexually oriented premium programming. Typically the signal is scrambled for cable viewers who don't purchase the premium fare. But scrambling is often imprecise, allowing some portion of the audio or video to be received. So the statute required cable TV operators who provided premium channels "primarily dedicated to sexually oriented programming" to "fully scramble or otherwise block" those channels or limit transmission to the hours when children are unlikely to be viewing, ten P.M. to six A.M. Fearing that they could not technically ensure complete scrambling, most cable operators responded to the law by limiting transmission of adult channels to that one-third of the day.

Playboy, a provider of adult premium-channel programming, filed a lawsuit claiming that section 505 was an unconstitutional, content-based restriction. In 2002 the Supreme Court agreed. Writing for the 5–4 majority in *United States v. Playboy Entertainment Group, Inc.*, Justice Kennedy acknowledged that many adults would find Playboy's programming offensive and would not want it readily available to their children. But he said a blanket restriction that has the effect of squelching the programming, even for a willing audience, is a restriction that must be narrowly tailored to promote a compelling interest. Although the cable medium "presents unique problems . . . which may justify restrictions that may be unacceptable in other contexts," Kennedy wrote, the standard the government must meet is strict scrutiny.<sup>67</sup>

And in this case, the statute was not narrowly tailored. The Court noted that one of the ways cable is significantly different from broadcast is its capacity to block unwanted channels household-by-household. This targeted blocking, based on customer request rather than a blanket government edict, would be a less restrictive means of protecting children from adult programming. Therefore, § 505 violated the First Amendment.

## TELEPHONE

A relatively recent phenomenon has been the growth of commercial services that offer taped erotic messages or live sexual entertainment over the telephone. Parents complained to legislators, phone companies, and the FCC about the easy access of these services to children and the fact that some minors had unknowingly run up huge phone bills listening to erotic telephone entertainment.

In 1988 Congress amended the Communications Act to prohibit such services. A total ban was imposed, making it illegal for adults as well as children to have access to sexually explicit messages over the phone. This legislation raised interesting constitutional questions: Could the government legally regulate sexual expression within commercial telephone messages aimed at consenting people? If so, could it ban messages that are indecent or only those that are obscene? The matter reached the Supreme Court in *Sable Communications of California, Inc.*

*v. FCC*.<sup>68</sup> The Court upheld the statute, but only to the extent that it banned obscene messages. The Court reiterated that obscenity is not protected by the First Amendment and that its distribution could be prohibited even to willing adults. The Court equated the statute to the ban on sending obscene materials through the mail, which the Court upheld in 1971.

In *Sable* all nine justices agreed, however, that the telephone restriction was unconstitutionally overbroad to the extent that it also prohibited sexual messages that were merely indecent. Sexual expression that is indecent but not obscene is protected by the First Amendment and may be banned totally only if the ban is narrowly tailored to promote a compelling interest, the Court said. Though a compelling interest did exist—protecting children from the potentially harmful effects of such messages—an outright ban on sexual messages to adults and children alike was by no means a narrowly tailored law. It was more like burning the house to roast the pig, the Court said. The government could not limit the adult population to only what is fit for children, the Court ruled, when other solutions exist for limiting access by children.

Following the *Sable* ruling, Congress altered the statute, and the FCC issued new regulations in order to eliminate children's access to indecent phone messages by less restrictive means. The statute now specifies that if the telephone company performs the billing, explicit calls shall not be connected unless the telephone subscriber has requested access to such messages in writing. This is referred to as reverse blocking. Otherwise, FCC regulations specify that the consumer must pay for adult phone content by credit card, in advance, or the service provider must require a special access code issued only to adults. These less sweeping restrictions were upheld by the Court of Appeals in 1991.<sup>69</sup>

## THE INTERNET

Efforts to curb sexually explicit materials on the Internet have been highly controversial, to say the least. The prevalence of explicit websites and raunchy cyber-advertising has outraged many, who view it as a pornography invasion into homes across America and an enticement to children. For others, access to all levels of sexual expression exemplifies the glorious, wide-open frontier of the Internet, where the oppressive hand of government has no place.

In legal circles, the 1990s, were a time of much debate about the proper framework, or model, for regulating content on the Internet. Often that debate concerned sexually explicit content, where the perceived clash between morality and the First Amendment is most pronounced. Should the Internet be accorded the same First Amendment freedom as a newspaper or magazine, where only the most hard-core, obscene content can be banned? Or should the Internet be regarded more like broadcast media, subject to regulation of “indecent” content that would otherwise be fully protected speech?

### **Communications Decency Act**

The Supreme Court finally had a chance to address the First Amendment status of the Internet in a 1997 decision. Congress had enacted the sweeping Communications Decency Act (CDA), a portion of the Telecommunications Act of 1996. The CDA made it a crime to place on the Internet any sexual expression that was patently offensive or indecent, though not necessarily obscene, unless the material could be effectively shielded from minors. On the same day the CDA was enacted, the American Civil Liberties Union and nineteen other groups joined to file a First Amendment lawsuit against the act. The plaintiffs charged that the CDA ban was far too broad and would threaten the ability of the Internet to serve as a medium of free expression, education, and commerce for adults. Furthermore, the groups alleged, less drastic alternatives existed that would more effectively protect children, including user-based blocking technology that allows parents to screen out content they deem inappropriate.

The high-profile case found its way to the Supreme Court and, in *Reno v. ACLU*,<sup>70</sup> the Court invalidated those portions of the CDA that attempted to restrict speech other than that which is strictly obscene. In the majority opinion by Justice Stevens, the Court distinguished this case from *Pacific*, where the issue was regulation of a medium that had historically received limited First Amendment protection and that was highly accessible to children. In broadcast, content warnings could not adequately protect the unsuspecting listener or viewer. By contrast, the Internet had no such tradition of content regulation. Furthermore, it is not as invasive as radio or TV, the Court noted. Users seldom encounter websites “by accident,” but must take a series of affirmative steps to access specific material. The Court equated this case to its earlier decision in *Sable Communications v. FCC*, in which the Court invalidated a ban on indecent sexual messages on the telephone.

### **Child Online Protection Act**

Congress decided to try again. In 1998 it passed the Child Online Protection Act (COPA), which provided in part:

Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than \$50,000, imprisoned not more than 6 months, or both.<sup>71</sup>

COPA defined “harmful to minors” in a manner similar to the *Miller* test for obscenity, but with a broader swipe, prohibiting material patently offensive “with respect to minors.” Also, harmful material was to be determined in part by referring to “contemporary community standards”—a problematic concept for the worldwide Internet. Purveyors of explicit web material could avoid liability,



according to the act, by requiring use of a credit card or other screening device to help ensure that only adults accessed a site.

The law was to become effective late in 1998, but the ACLU and a group of other plaintiffs challenged the act, and the federal District Court issued a preliminary injunction against the statute's enforcement. The District Court acknowledged that protecting minors from harmfully explicit material was a compelling government interest, but it also concluded that COPA was written too broadly and would have a chilling effect on constitutionally protected adult speech. After years of maneuvering in the federal courts, the contentious case reached the U.S. Supreme Court for a narrow ruling in 2002, then moved back to the lower courts, and then back to the Supreme Court for a more significant ruling in 2004.

In *Ashcroft v. American Civil Liberties Union*,<sup>72</sup> the Court upheld the preliminary injunction against enforcement of COPA. The statute likely violated the First Amendment, the Court's 5–4 majority concluded, because it did not use the least restrictive means available to achieve its goal of protecting children. The Court noted that readily available filtering software was not only a less restrictive alternative but likely more effective as well. In fact, a commission created by Congress itself had concluded that filtering software was a superior way to protect minors from graphic sexual material. Filtering software allows consumers, at the receiving end of speech, to make their own, selective decisions whether to block certain material. For example, adults without children in the home could choose to access erotic sites without having to identify themselves each time or provide credit card information; adults with children could turn on the content filtering technology. This approach, unlike the criminal penalties in COPA, would not create a chilling effect on the creators of otherwise legal sexual content intended for adults. The case was sent back to the district court for a full trial to determine whether the latest filtering technology would in fact be a less burdensome yet equally effective alternative to the challenged statute. And in 2007 the trial court answered that question in the affirmative and granted a permanent injunction against the act.

Again the government appealed. The Third Circuit affirmed the trial court, noting that the statute was overly broad and also unlikely to be effective, as enforcement would be impractical against the high volume of sexual content originating from outside the United States.<sup>73</sup> Then finally in 2009, a full decade after its passage, COPA died when the Supreme Court denied the government's petition for review.

In the chapter Hypothetical, the condom ad, which is not likely obscene, is much more likely to be deemed indecent for broadcast. This is because almost any showing of actual sex organs has been judged patently offensive as measured by contemporary community standards for the broadcast medium. Court decisions make clear, however, that the obscenity standard, not indecency, is the boundary

for allowable expression on the Internet. This means that the proposed commercial could appear during the “safe harbor” hours on your broadcast, and the ad could run on your website at any time. So, in a case like this, network and station advertising standards, as much as the law, will influence your decision.

## Summary Points

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**Whether explicit sexual expression causes any significant harm** to society has been, and remains, a hotly debated issue. Even without solid evidence of harm, however, the U.S. Supreme Court has declared a hard-core class of expression, called obscenity, to be without First Amendment protection.

**The Supreme Court has devised a three-part definition** of obscenity, called the *Miller* test, which serves as the dividing line between sexual expression protected by the First Amendment and that which is not. Under the *Miller* test, material can be judged obscene only if it is aimed at prurient interests in sex, contains patently offensive depictions or descriptions of sexual conduct, and lacks serious literary, artistic, political, or scientific value.

**Obscenity may be subject to prior restraint**, but only if based on a prompt judicial determination of obscenity; determining what is obscene cannot be left to the discretion of administrators.

**The local distribution of sexually explicit material**, whether obscene or not, may be controlled as to time, place, and manner. This is most often accomplished through zoning ordinances.

**In the broadcast media**, Congress has prohibited indecency as well as obscenity. Whether punishment for indecency is constitutional, however, depends on the circumstances. Sanctions against indecency will be upheld if the content was aired when significant numbers of children were likely in the broadcast audience.

**The indecency rationale has not been applied** by the courts, however, to limit First Amendment freedoms in other media, such as cable TV and the Internet.

**In the chapter Hypothetical**, the condoms commercial would not violate obscenity laws, even though the man’s genitals were partially visible in the ad. Simple nudity is insufficient to qualify as obscenity under the *Miller* standard, unless coupled with some kind of graphic sexual activity or unless aimed specifically at an audience of children. The commercial poses a greater legal danger, however, under the FCC’s indecency standard, unless the ad runs only during safe harbor hours.

## Discussion Questions

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1. How would you devise a new, more workable legal standard for obscenity? Should the purpose of the communicator be considered? Should evidence of harmful effects be required, or should a presumption of moral harm be sufficient? Should the standard take into account whether the audience is willing or unwilling?
2. In his concurring opinion in the 1987 case of *Pope v. Illinois*, Supreme Court Justice Antonin Scalia said the justices' variety of opinions evidenced a "need for reexamination of *Miller*." If the Court were to undertake such a reexamination, what would be the most likely outcome? Some minor adjustments in the obscenity definition? Or do you think the current Court would be inclined to consider a whole new approach to obscenity and the First Amendment?
3. How about curbing violence? Could an approach similar to the *Miller* test be fashioned to exempt depictions of shocking violence from First Amendment protection?
4. This chapter has examined two main approaches to controlling sexually explicit depictions. One is to describe a class of expression—obscenity—that is without First Amendment protection and thus open to criminal punishment. Another approach is to rely on zoning laws and other quasi-time/place/manner restrictions to confine adult materials to places where they are unlikely to offend unwilling audiences or cause identified negative effects. Which of these approaches do you think is most effective? Which is most compatible with First Amendment ideals? Which best addresses legitimate moral concerns of society?
5. Courts have drawn a distinction between over-the-air broadcasting and cable TV and have concluded that the FCC's indecency prohibition cannot be applied to the latter. Cable is a less intrusive medium, the courts have said. Is this a valid distinction? Is electing to have a TV set in the home an affirmative action to the same extent as electing to subscribe to cable? And if a parent elects not to have cable TV in the home, is this a practical way of protecting children if indecent cable programming is nonetheless readily available in the community? Do your answers also apply to the Internet?

## Key Terms

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indecency  
*Miller* test  
 obscenity  
 patent offensiveness

pornography  
 prurient interest  
 safe harbor  
 scienter

# Commercial Speech



*After completing this chapter, you should*

- **Know** the extent of First Amendment protection afforded to commercial speech and how that protection has evolved.
- **Understand** how deceptive advertising is regulated by the states and the federal government and, in particular, understand the role of the Federal Trade Commission in policing advertising.
- **Know** which laws provide for criminal penalties against advertisers, which allow for private lawsuits by business competitors, and which allow for private lawsuits by consumers.
- **Understand** how the courts determine when government can ban or otherwise regulate even truthful commercial advertising.
- **Know** who—advertisers, ad agencies, and/or the media—can be held responsible for illegal advertising and know the basic rules concerning media refusal of advertising.

## Hypothetical

### Food Fight

Suppose you are responsible for executing a buzz-marketing campaign for a new magazine, *Fast-Food Fancy*, for people who like to know about the best deals, product reviews, contest information, and other fun news relating to fast-food restaurants. You plan an Internet-focused campaign that will include an interactive website, blog publicity, and mobile text marketing.

On the *Fast-Food Fancy* website you solicit new subscriptions with a special deal: order the magazine for the “special introductory price of \$21.95 per year.” But to get people talking, you do a lot more. You challenge website users to shoot their own *Fast-Food Fancy* commercials and submit them, along with an electronic entry form that includes the user’s real name, e-mail address and fast-food preferences. All ages are urged to enter. And the winning video will be featured on the website for a full month. So far your favorite submission is from a user who shot video of his uncle, a well-known, professional bowler. In the video the bowler is shown standing in the middle of a bustling burger restaurant, holding up a copy of the magazine while he says, “During the off-season I like to build up my energy by eating at an all-American restaurant like this one. And I’ve also learned to count on *Fast-Food Fancy* for top-quality articles and behind-the-scenes advice to help me track down the best burgers, just the way I like ‘em.” You’re not sure if the bowler really eats fast food or reads your magazine, but you’d love to upload the user-generated commercial to several popular websites.

You’ve also scored a big hit with a twenty-one-year-old blogger who has become recognized as an expert on fast food. You sent him a copy of *Fast-Food Fancy*, along with tickets for an expenses-paid trip to the upcoming Fast Food Expo in Las Vegas, hoping that he would be inspired to write a positive review of your magazine. And he promptly wrote a glowing blog about the publication, urging all his readers to subscribe. (He didn’t mention anything about the free trip, though.)

And meanwhile, you’re excited about your mobile marketing campaign. After purchasing cell phone numbers from several sources, you have begun sending text messages that begin, “HUNGRY? HERE’S YOUR FAST-FOOD FANCY DEAL OF THE DAY. . . .” And you ask for some personal information and a text back, so that you can build a valuable database for the magazine and its advertisers.

But just while things were going so well, you learned that Congress just passed legislation that bans all fast-food advertising that’s likely to reach children under 14. Fast-food advertising accounts for more than half the ads carried in the magazine, so the ban could be devastating to the publisher. You’re also concerned now about the legality of your own marketing campaign—and of the magazine content itself. Congress determined the ban was justified because, as one senator said, “Junk food dependency is an insidious epidemic afflicting our nation’s youth.” The advertising ban, Congress thought, would be one way to reduce the demand for unhealthy food.

Would the courts uphold the advertising ban as constitutional? Does any part of your marketing campaign risk violating laws against deceptive advertising or other improper advertising practices? Would the magazine and your website be considered commercial speech or noncommercial speech, and why might this distinction matter?

## SELLER BEWARE?

Commercial speech—speech intended to generate financial or commercial transactions—is a huge piece of the nation’s expressive activity. Much of it may simply be called advertising, though this category of expression also covers speech that might better be defined as promotion or marketing communication.

Commercial speech also is the target of lawsuits and regulations from almost every conceivable direction. Indeed, in the midst of this chapter, one might come to wonder whether the old common-law phrase, *Caveat emptor*, or “Let the buyer beware,” is any longer a valid generalization about legal doctrine today. As far back as 1937, the Supreme Court declared that U.S. law had evolved to the point where it protected the trusting consumer as well as the suspicious. In the world of commerce, the Court said, “the rule of *caveat emptor* cannot be relied upon to reward fraud and deception.”<sup>1</sup> Today in many respects, it is the commercial advertiser who had best beware. And each year the maze of regulation becomes even more complex, as lawmakers attempt to deal with consumer complaints about the latest online advertising tool—from spam to blogs to virtual-world fan sites, user-generated content, social networking, widgets, wiki boards, and viral texting.

Yet even as the age of consumerism was bearing down upon commercial speech in recent decades, this form of expression was gaining some increased measure of First Amendment status. Castigated as self-serving and socially worthless for most of the 1900s, commercial speech can indeed benefit consumers and should not be subject to unbridled government restrictions, the Supreme Court has decided in recent years.

Many of the legal problems discussed elsewhere in this book are of significant concern to commercial messengers. These include time/place/manner restrictions (regulating billboards, for example), trade libel, commercial appropriation of name or likeness, copyright infringement, trademark infringement, and the common law tort of unfair competition. Such general legal concerns as breach of contract and fraud also arise occasionally in connection with deceitful advertising or promotions. This chapter will not examine the broad field of commercial transactions law. Rather, the chapter focuses on some of the specialized legal considerations faced by those who create advertising content and other forms of commercial speech. Occasionally these are statutes that attempt to altogether ban certain advertising. More frequently they are laws that prohibit misleading advertising or invade privacy with some form of behavioral marketing.

Regulation of commercial speech is an area of shared jurisdiction between the states and the federal government, which has broad authority in matters affecting interstate commerce. At the federal level, Congress has enacted laws that are enforced against advertisers by their business competitors or by federal agencies, most notably the Federal Trade Commission (FTC). The FTC is also granted authority to enact its own regulations against deceptive advertising, consistent with the statutory mandate of Congress.

State legislatures pass laws that restrict commercial advertising content in the interest of protecting that state's consumers. Primary responsibility for enforcing the state statutes falls to state attorneys general and local prosecuting attorneys. But in some cases, business competitors and even consumers are allowed to enforce the laws through private lawsuits.

## COMMERCIAL SPEECH AND THE FIRST AMENDMENT

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Historically, courts classified commercial speech as a form of expression unprotected by the First Amendment and thus open to virtually unlimited regulation. Commercial speech was left unprotected because it was considered to be an entirely self-serving, one-sided form of expression that contributed nothing to public discourse.

The Supreme Court endorsed this traditional view in the 1942 case of *Valentine v. Chrestensen*. In that case a man who had purchased a used Navy submarine passed out leaflets urging people to come tour the vessel for a fee. Police stopped the man and informed him that a city ordinance prohibited distribution of commercial leaflets on the streets. (Educational or political leaflets were permitted.) A unanimous Supreme Court upheld the ordinance. The Court noted that streets are indeed proper places to communicate information and opinion freely and that local governments may not unduly burden or ban such expression. But the Court said it was “equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”<sup>2</sup>

For three more decades, the Court seemed to adhere to the *Valentine* approach with respect to commercial advertising. During that period the Court upheld a local ban on door-to-door magazine subscription solicitations (1951), a state ban on ads for eyeglass frames (1955), and a federal ban on broadcasting cigarette ads (1972).<sup>3</sup> In none of these cases did the Court indicate that the First Amendment was even an issue.

### THE RISE TO PROTECTION

In the mid-1970s, the Supreme Court's view of commercial speech shifted toward some degree of First Amendment protection. The first signal of this shift came in a 1975 case in which a Virginia newspaper editor had been convicted for running

an ad that announced the availability of legal abortions in New York. At the time a Virginia state statute prohibited any abortion promotions. But the Supreme Court reversed the conviction and rejected the notion that commercial speech was totally without First Amendment protection.<sup>4</sup> Yet the abortion ad decision did not conclusively establish that purely commercial speech is constitutionally protected. The facts of the case did not lend themselves to that conclusion because the abortion ad did more than simply propose a commercial transaction; it contained factual material, clearly of public interest, about an important issue of the time. What would the Court say about a routine ad that simply announced a product and price and invited a purchase?

A year later, in the 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court squarely held that “pure commercial speech”—that which aims solely to propose a commercial transaction—is generally protected by the First Amendment. A Virginia statute had made it illegal for pharmacists to advertise prices for prescription drugs. The statute was challenged, not by pharmacists, but by an individual consumer and two nonprofit consumer groups. Their claim was that the First Amendment entitles the users of prescription drugs to receive information that pharmacists wish to communicate to them through advertising.

The Court first addressed the interesting point of First Amendment doctrine and acknowledged that the amendment does indeed confer a limited “right to receive information.” Wrote Justice Harry Blackmun for the majority: “Freedom of speech presupposes a willing speaker. But where a speaker exists, as in the case here, the protection afforded is to the communication, to its source and to its recipients both.”<sup>5</sup>

The Court next addressed the issue of whether purely commercial speech is excepted from First Amendment protection and concluded that it is not. Even assuming that the advertiser’s interest is a purely economic one, Justice Blackmun wrote, that fact does not disqualify the speech for protection under the First Amendment. Economic motive does not mean the speech is without individual importance or social merit. And generally speaking, he said, society has a strong interest in the free flow of commercial information:

As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate. . . . Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product for what reason, and at what price.<sup>6</sup>

This did not end the discussion in *Virginia Pharmacy Board*, however, for the question remained: Was the advertising ban justified by reasons that outweighed the First Amendment protection? The state argued that the advertising ban was justified because of the need to maintain a high degree of professionalism on the



part of licensed pharmacists. The state claimed that aggressive price competition would result from unlimited advertising and that this would divert pharmacists' attention from professional service and reduce their status to that of mere retailers. Justice Blackmun did not articulate a specific First Amendment standard for commercial speech, but he did conclude that the state's asserted justifications were simply insufficient to override protection. "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways," Blackmun wrote. "But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering."<sup>7</sup>

The following year the Supreme Court turned its attention to advertising in the professions. In *Bates v. State Bar of Arizona*, two Arizona attorneys challenged a state disciplinary rule that prohibited lawyers from advertising their services in any mass medium. The state prohibition—which applied even to the mere advertisement of prices for legal services—was claimed by Arizona to be justified because advertising would allegedly (1) erode the profession's service orientation, (2) push fees higher because of increased overhead costs for lawyers, and (3) stir up more litigation in society.

But the Court, citing *Virginia Pharmacy Board*, held that blanket suppression of lawyers' advertising violated the First Amendment. To the extent attorneys' ads were false or misleading, they could be outlawed. Claims as to the quality of services might fall into this category, the Court said. But the Court ruled there is nothing inherently misleading about ads that announce the availability and terms of routine legal services. Nor was the Court persuaded that any of the state's proffered justifications were sufficient to suppress such ads. Justice Rehnquist dissented in *Bates*, arguing the traditional view that commercial advertisements are "not the sort of expression that the Amendment was adopted to protect."<sup>8</sup>

## THE CENTRAL HUDSON TEST

The *Virginia Pharmacy Board* decision set a strong precedent in favor of constitutional protection for commercial speech, and it is looked upon as a landmark case. The ruling did not clearly establish how much protection commercial advertising was afforded, however. It did not pronounce a test or standard of review for courts to use in later cases. That came in 1980, in the case of *Central Hudson Gas & Electric Co. v. Public Service Comm'n of New York*.<sup>9</sup>

In *Central Hudson*, the Court was asked to determine the constitutionality of a New York state ban on promotional advertising by electric utilities. The ban had been instituted on grounds that advertising that promotes the use of electricity is contrary to the national policy of conserving energy.

### **Four-Part Analysis**

In a majority opinion by Justice Lewis Powell, the Supreme Court observed a commonsense distinction between speech proposing a commercial transaction, which occurs in the traditionally regulated domain of commerce, and other kinds of speech. Therefore, the Court concluded that commercial speech is accorded lesser protection than other constitutionally guaranteed expression. The Court then set out the following four-step analysis to determine the constitutionality of regulation:

1. Is the commercial message either misleading or related to unlawful activity? If so, it is not constitutionally protected and may be banned. If not:
2. Does the government assert a substantial interest to be achieved by the restriction on speech?
3. Does the restriction directly advance this interest?
4. Is the restriction no more extensive than necessary to further the government's interest?

If the answer to these last three questions is yes, the restriction on truthful commercial speech will be upheld.

Applying the test to the facts in *Central Hudson*, the Court concluded first that the commercial expression at issue was indeed protected speech because it was not argued to be inaccurate or related to unlawful activity. So the analysis continued: Second, the Court agreed that the state's interest in conserving energy was a substantial interest given the nation's dependence on energy sources beyond its control. Third, the Court also agreed that the advertising ban directly advanced the state's interest because there is a direct link between promotion and increased sales—in this case increased demand for electricity. On the fourth and final point, however, the Court ruled against the state. The advertising ban was a restriction more extensive than necessary to further the state's interest because the ban applied to all promotional advertising by the utility, regardless of its effect on energy use. Energy conservation, important as it is, could not justify suppressing information about electrical devices or services that would cause no increase in energy use, the Court said. Therefore, the ban was unconstitutional.

Part four of the *Central Hudson* test initially caused some confusion among lower courts. As stated in *Central Hudson*, the requirement is that a restriction on commercial speech be no more extensive than necessary. But does the term "necessary" mean *absolutely* necessary? No, the Court clarified in 1989; it means *reasonably* necessary. In order to be constitutional, an advertising restriction need not be the single least severe means of achieving the government's goal. Rather, the test requires a reasonable "fit" between the government's ends and the means chosen. The advertising restriction must be narrowly tailored to achieve the government's objective, but government is entitled to some reasonable choice among various well-tailored regulatory methods.<sup>10</sup>

The Supreme Court thus made it clear in *Central Hudson* and later cases that commercial speech is not protected to the same extent as most forms of noncommercial speech. One distinction is that protection for commercial speech is deemed lost if the expression is false or misleading. No similar exception exists for political speech, for instance. In some cases false political speech can be subject to a lawsuit for libel. But there is no general rule that misleading political speech is unprotected by the Constitution.

Another distinction is that protection for purely commercial speech may be overcome by a *substantial* government interest in regulation. Most other forms of protected speech can be overridden only by a *compelling* justification.

## DEFINING COMMERCIAL SPEECH

Given the reduced protection for commercial speech, determining whether a communication is commercial or noncommercial can be critical. The Supreme Court has indicated on several occasions that it intends to draw a fine line, if necessary, and that there is no single litmus test. For example, in a footnote to the *Central Hudson* opinion the Court said that promotional advertising would not be accorded full First Amendment protection simply because the touted products or services may be tied to public concerns with the environment, energy, economic policy, health, or safety. But the Court has also indicated that otherwise political or educational messages are not automatically transformed to commercial simply because the speaker has an economic motivation.

### ***The Youngs Drug Ruling***

In *Bolger v. Youngs Drug Products Corp.*, the Supreme Court was asked to judge the validity of a federal statute that prohibited the mailing of unsolicited contraceptive advertisements. The contraceptive manufacturer who challenged the statute routinely mailed informational pamphlets that discussed the desirability and availability of condoms in general, as well as mentioning the manufacturer's products in particular. Therefore, the Court's initial, difficult inquiry was whether the pamphlets were commercial or noncommercial expression. The Court confirmed that "the core notion of commercial speech" is "speech that does no more than propose a commercial transaction,"<sup>11</sup> quoting language from its earlier cases. And the Court acknowledged that the pamphlets in this case clearly did more than propose a transaction. And yet, despite the pamphlets' informational content and the discussion of public issues, the Court ruled that the overall character of the mailings amounted to commercial speech. If a contrary rule were adopted, the Court said, then other advertisers could "immunize false or misleading product information from government regulation simply by including reference to public issues."<sup>12</sup>

In reaching its conclusion in *Bolger*, the Court noted three characteristics of the mailings that, when combined, warranted their classification as commercial

speech: (1) The company paid for the pamphlets, a typical form of advertising; (2) the pamphlets included references to a specific product; and (3) the company had an economic motive for mailing the pamphlets. The Court said none of these characteristics, by themselves, would necessarily make the pamphlets commercial speech. But the combination of all three characteristics provided “strong support” for classifying the messages as commercial, the Court said. The Court cautioned that its ruling should not be taken to mean that all three of these characteristics must be present to classify speech as commercial, nor that the presence of all three necessarily makes speech commercial.

Despite the Court’s efforts to guide future determinations of commercial or noncommercial speech, the fact is that the 1983 *Bolger* decision left considerable confusion in its wake. In some circumstances, nontraditional advertising that makes a serious effort to educate or to address public issues nevertheless would be classified as commercial speech. But this legal direction, somewhat like defining obscenity, is inherently murky. The public relations profession, in particular, is left in a state of bewilderment. If a consumer-products corporation weighs in on a public debate by writing a letter or op-ed piece for a newspaper, is this commercial speech?

### ***The Nike Saga***

The problem was glaringly evident in a 2002 California Supreme Court decision in *Kasky v. Nike, Inc.* Nike, an Oregon corporation, manufactured much of its athletic footwear and apparel in Indonesia. Beginning in 1996 and continuing for more than a year, news media reported allegations that Nike’s overseas factories paid workers less than minimum wage, violated legal limits on overtime, exposed workers to unsafe working conditions, and in general constituted “sweatshops.” In response to the considerable negative publicity, Nike launched a public relations campaign that directly refuted the allegations in news releases, letters to newspapers, letters to university athletic directors, and other public communications. Nike also purchased full-page newspaper ads to publicize a report by an outside organization that found no illegal or unsafe working conditions in Nike facilities.

Under the authority of California statutes against misleading advertising, a citizen filed a lawsuit against Nike, on behalf of the public, claiming that Nike’s messages contained false representations. The threshold question for the courts was whether Nike’s communications in fact amounted to commercial speech, or whether they were noncommercial speech entitled to full First Amendment protection.

In a 4–3 decision, California’s high court held that the Nike communications were commercial speech, thus necessitating further proceedings in the trial court to determine if the communications were misleading in any respect and in violation of the law. The majority of the California court looked to the *Youngs Drug* case for guidance, acknowledged the ambiguity on the boundaries of commercial

speech, and then fashioned its own, slightly different set of factors to consider: “When a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message.”<sup>13</sup> Noting that the speaker was a commercial enterprise, the intended audience was actual and potential purchasers of Nike products, and the message content was factual representations about its own business operations, the court concluded that the speech was commercial.

The dissenting justices found this result blatantly unfair:

While Nike’s critics have taken full advantage of their right to “uninhibited, robust, and wide-open” debate, the same cannot be said of Nike, the object of their ire. When Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike’s critics enjoy. . . . Handicapping one side in this important worldwide debate is both ill considered and unconstitutional.<sup>14</sup>

But the majority of the state’s high court believed Nike properly should carry the heightened burden of accuracy that adheres to commercial speech:

Our holding . . . in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully. Unlike our dissenting colleagues, we do not consider this a remarkable or intolerable burden to impose on the business community.<sup>15</sup>

The U.S. Supreme Court in 2002 granted review of the California high court’s decision in *Nike*, setting a seemingly ideal stage for a bold pronouncement on the First Amendment rights of corporate speakers. But in an anti-climactic move, the Court in 2003 dismissed the writ of certiorari on procedural grounds. Later that year the parties reached a pre-trial settlement. So the California Supreme Court’s ruling in *Nike* stands, but it remains a highly questionable decision.

## ADS FOR DISFAVORED PRODUCTS

Most commercial advertising regulation is aimed at false advertising, the kind that is unprotected by the First Amendment. This field of regulation is examined later in the chapter. But some restrictions have also been aimed at truthful advertising of lawful—though typically “disfavored”—products and services.

For example, in the *Youngs Drug* case the federal statute at issue prohibited mailing of all unsolicited contraceptive ads, not just those that were false. Because

**QUICK****CHECK****Can Truthful Ads Be Banned?**

- Is the restriction supported by a “substantial” interest, such as public health, safety, or economic welfare?
- Is the government’s interest directly advanced by the restriction?
- Is the restriction no more extensive than reasonably necessary to achieve the government’s goal?

the manufacturer’s mailings were ruled commercial speech, First Amendment protection was diminished. But because the pamphlets were truthful, a moderate degree of protection remained. In order for the statute to be valid as applied to the plaintiff’s truthful pamphlets, the government had to show that the restriction was carefully tailored to serve a substantial interest. The government asserted two interests: The first was to protect recipients from offense; the second was to allow parents to control their children’s access to birth control information. The Court ruled that these interests were insufficient, however, and held the statute unconstitutional as applied. The majority opinion noted that government may not shut off the flow of protected mailings for the mere reason of shielding people who might be offended. Furthermore, the ban on mailings would provide only a marginal degree of assistance to parents.

Another example of restrictions on truthful commercial speech—one that has been in effect for decades—is the federal ban on cigarette advertising in the broadcast media. The statute reads that “it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.”<sup>16</sup> Note that the approach of Congress was to restrict advertising of a controversial product rather than to ban or restrict the product itself. The Supreme Court upheld the statute in 1972 without issuing a written opinion. Recall, though, that this was prior to the *Virginia State Board* case, in which the Court first granted constitutional protection to purely commercial messages.

Since the mid-1990s, the U.S. Supreme Court has decided a number of cases involving restrictions on advertising for disfavored products, and the Court has consistently sided with freedom of speech, applying the *Central Hudson* test rigorously.

**The Liquor Cases**

As one might guess, advertising for alcoholic beverages has been the subject of considerable state and federal regulation. Though the Twenty-First Amendment to the Constitution is interpreted to give the states great latitude to control alcohol, restrictions on liquor advertising may nevertheless raise serious First Amendment concerns. This is illustrated by Supreme Court cases in 1995 and 1996.

The first of these cases was *Rubin v. Coors Brewing Co.* Coors had applied to the Bureau of Alcohol, Tobacco, and Firearms for approval of proposed labels and ads that disclosed the alcohol content of its beer. The application was rejected on the ground that a federal statute specifically prohibited disclosure of the alcohol content of beer on labels or in ads. Coors sued for a declaratory judgment that the statute violated the First Amendment.

The government's main justification for the restriction was to prevent "strength wars" among brewers. Competition on the basis of alcohol strength would lead to greater alcoholism and its attendant social costs, the government said. The Court, in an opinion written by Justice Clarence Thomas, agreed that the health-and-welfare concerns were substantial. But the government encountered great difficulty with the next part of the *Central Hudson* test.

The Court reiterated that the government must show its regulation directly advances the asserted interests and that this cannot be established by mere speculation and conjecture. Rather, the government must demonstrate that its restriction will in fact alleviate real harms to a significant degree. This the government could not do in *Coors*, the Court held, because of the overall irrationality of the government's regulatory scheme. The Court noted, for example, that whereas the federal statute banned the disclosure of alcohol content on beer labels, it allowed and in some cases even required the disclosure of alcohol content for wine and spirits. "If combating strength wars were the goal, we would assume that Congress would regulate disclosure of alcohol content for the strongest beverages as well as for the weakest ones,"<sup>17</sup> Justice Thomas wrote. Furthermore, the government was already allowing some brewers to signal high alcohol content through use of the term *malt liquor*. In sum, the Court said, the challenged restriction could not actually be effective in preventing strength comparisons and alcoholism because of the government's own countervailing laws and regulations.

In the Court's 1996 case, *44 Liquormart, Inc. v. Rhode Island*, the issue was whether the state could constitutionally prohibit the advertising of alcohol prices. In an effort to promote temperance in the consumption of alcohol, Rhode Island banned price advertising except at the place of sale. The theory behind the ban was that it would prevent public price wars, thereby minimizing discount shopping and the purchase and consumption of added amounts of alcohol. Seeking a declaratory judgment that the price advertising ban was unconstitutional, *44 Liquormart* sued. A unanimous Supreme Court held the ban invalid. Though the justices were split in their reasoning, all seemed to agree, at least, that Rhode Island's restriction was overly broad and therefore flunked the final prong of the *Central Hudson* test. Alcohol consumption could be tempered more directly and efficiently by setting minimum prices or increasing sales taxes, the Court noted. Four justices went further by expressing nearly categorical hostility toward any

regulation that seeks to manipulate consumers' behavior by keeping them in the dark about truthful, nonmisleading information.<sup>18</sup>

### **Casino Advertising**

In 1999 the Supreme Court examined casino advertising, and a unanimous Court sided with the First Amendment. At issue in *Greater New Orleans Broadcasting Association, Inc. v. United States* was a federal statute that prohibits broadcasters from airing any commercials for gambling. The statute is broadly worded but also contains many exceptions. The Federal Communications Commission interpreted the statute to ban, among other things, any broadcast ads for privately owned casinos.

An association of Louisiana broadcasters challenged the restriction, for the stations wished to air promotional ads for casinos that are legal in Louisiana and neighboring Mississippi. The lower federal courts, applying the *Central Hudson* test in a manner consistent with a casino advertising case from the 1980s, granted summary judgment in favor of the government. They concluded the government had a substantial interest in minimizing participation in gambling, in order to minimize gambling's social costs, and that the ad ban was a well-tailored way to serve that interest.

But the Supreme Court disagreed, holding the statute unconstitutional as applied to broadcasters in states where casinos are legal. Justice Stevens, writing for the Court, said the government cannot persuasively argue that the ban directly advances a substantial interest when the government's own prohibitions on gambling and gambling ads are so riddled with exceptions. For example, the statute in question prohibits all broadcast ads about privately operated casinos. But ads for tribal casino gambling, legalized by state compacts, are subject to no such ban. Furthermore, the Court said, the ad ban sacrifices an intolerable amount of truthful speech about lawful conduct when compared with the social ills government could reasonably hope the ban to eliminate. The Court held: "The power to prohibit or regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct."<sup>19</sup>

In a concurring opinion, Justice Thomas was even more forceful, reiterating a position he introduced in a concurrence to *44 Liquormart*:

In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the *Central Hudson* test should not be applied because such an interest is *per se* illegitimate and can no more justify regulation of commercial speech than it can justify regulation of noncommercial speech.<sup>20</sup>

Though the majority of the Court remains content with the *Central Hudson* balancing approach, it is clear from *Greater New Orleans Broadcasting* that the Court will look very skeptically upon advertising bans for products or services that the government itself has determined should be available.



### ***Tobacco Products***

Finally, in *Lorillard Tobacco Co. v. Reilly*, the Supreme Court in 2001 applied the *Central Hudson* test to restraints on tobacco product advertising. The attorney general of Massachusetts had created comprehensive regulations limiting advertising for cigarettes, smokeless tobacco, and cigars in order “to stop Big Tobacco from recruiting new customers among the children of Massachusetts.” The regulations prohibited outdoor advertising within 1,000 feet of any playground or school. They also prohibited any point-of-sale advertising placed lower than 5 feet from the floor of any retail store located within 1,000 feet of a playground or school. Several tobacco product manufacturers and retailers sued, claiming the regulations violated the First Amendment.

The Supreme Court concluded that portions of the state’s cigarette advertising restrictions were invalid because they were preempted by a federal statute that regulates cigarette advertising, packaging, and promotions. But with regard to the smokeless tobacco and cigar advertising restrictions, the Court completed a First Amendment analysis. Justice O’Connor, writing for the Court, said there was no issue on parts one and two of the *Central Hudson* test: The regulations pertained to truthful speech protected by the First Amendment, and all parties agreed that the state had a substantial interest in preventing tobacco use by minors. But parts three and four of the test required thorough examination, and it was ultimately part four that doomed the outdoor advertising restriction.

That final part of the test requires that government “carefully calculate the costs and benefits associated with the burden on speech” created by the regulations, the Court said. Then it noted that the regulations would have the effect of preventing outdoor ads in 87 to 91 percent of Boston, Worcester, and Springfield. In some places this constituted nearly a complete ban on truthful advertising about smokeless tobacco and cigars. Wrote the Court:

The breadth and scope of the regulations, and the process by which the Attorney General adopted these regulations, do not demonstrate a careful calculation of the speech interests involved. . . . The State’s interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.<sup>21</sup>

Thus the outdoor advertising restriction’s incursion on legitimate speech was too extensive for the First Amendment. The Court had an easier time invalidating the blanket height restriction for point-of-sale advertising, saying that restriction was not a sufficiently tailored fit with the state’s asserted goal of protecting minors and that it flunked both parts three and four of the *Central Hudson* test.

How about the ban on “junk-food” advertising posed in the chapter Hypothetical? Would a federal ban likely be constitutional? Unlike casino gambling or alcoholic beverages, consuming high-calorie fast food has been entirely legal in the United States. Government’s biggest hurdle would be showing that a ban on advertising low-nutrition foods to children *directly advances* the government’s interest in healthier children while the product itself is remains fully available.

## REQUIRED DISCLOSURES

As an alternative to outright bans, advertisements for some legal products are required to contain specified language in the form of a warning, notice, or other disclosure. In fact, disclosure requirements have become a highly fashionable legislative approach. Mandated disclosures are generally viewed as a less objectionable way to exert some control over the messages consumers receive. As Chapter 2 detailed, forcing a speaker to make prescribed statements against the speaker’s will generally violates the First Amendment. But courts have also stated, as a matter of First Amendment doctrine, that “disclaimers are preferred over blanket proscriptions of speech.”<sup>22</sup>

Perhaps the best known of the disclosure requirements is the Federal Cigarette Labeling and Advertising Act.<sup>23</sup> Under that law, all forms of cigarette advertising, including billboards, must contain one of four specified warning labels, such as: “SURGEON GENERAL’S WARNING: Smoking causes lung cancer, heart disease, emphysema, and may complicate pregnancy.” The law also specifies that the warning statement must appear in conspicuous and legible type, contrast with other printed material in the ad, and be enclosed in a rectangle of a particular size.

Many other kinds of disclosure requirements have been enacted by the federal government and by the states. For example, the federal Food, Drug, and Cosmetic Act requires food and drug manufacturers to list ingredients on their product labels and on certain promotional materials inside stores.<sup>24</sup> New cars must be labeled with the percentage of U.S. parts in the vehicle. Consumer products must contain a warning of any potentially hazardous substances. And in 2009 California became the first state to require that restaurant chains display meal calories on their menus.

## DECEPTIVE ADS AND THE FTC

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In *Virginia State Board of Pharmacy*, the Supreme Court described the importance of commercial advertising in a free enterprise system and to some extent elevated the legal status of that expression. The Court made no attempt, however, to raise the status of *deceptive* commercial advertising, considered a despicable practice in society since the era of traveling medicine shows and “snake oil” peddlers in the late 1800s and early 1900s. False or deceptive commercial advertising, which

enjoys no First Amendment protection, has been declared unlawful in every U.S. jurisdiction.

Deceptive advertising is combated in many ways: by self-regulation groups within the advertising industry, by screening from the advertising media, by federal Lanham Act lawsuits filed by competitors, and by state attorneys general, for example. Historically, though, the predominant force against deceptive advertising has been the Federal Trade Commission.

## **AUTHORITY OF THE FTC**

The FTC—similar to the FCC—is an independent federal agency headed by five commissioners appointed by the president. No more than three of the commissioners may be from any one political party. Congress created the commission in 1914 and has given it increasingly broad statutory powers. The commission’s basic authority is derived from section 5 of the Federal Trade Commission Act, which charges the FTC with the responsibility to regulate “unfair or deceptive acts or practices in or affecting commerce.”<sup>25</sup>

Under this broad directive, the FTC combats a wide range of marketplace mischief, from fraudulent pricing and billing schemes to monopolistic practices. From the beginning, though, the FTC has also interpreted its mission to include the policing of advertising. The FTC Act does not define what constitutes an unlawful ad. Rather, the commission has been free to pave its own way through administrative rulemaking—with some guidance from the courts.

### ***Regulatory Aggressiveness***

As with other federal regulatory agencies, the FTC’s aggressiveness has fluctuated over the years. During some periods, the agency has been criticized by consumer advocates as an inactive and ineffective regulator. At other times, the business community has complained that the agency was overbearing in its scrutiny of advertising.

In the 1960s two published reports, one sponsored by consumerist Ralph Nader and the other by the American Bar Association (ABA), were highly critical of the agency. The Nader report charged that the FTC was in disarray caused by poor management, that it lacked sufficient resources and enforcement authority, that it wasted its efforts on trivial matters, and that it should make scrutiny of modern advertising techniques a higher priority.<sup>26</sup> Soon after release of the Nader report, President Nixon asked the ABA to study the commission. The ABA report was nearly as harsh, concluding that drastic changes were essential if the FTC was to achieve its intended effectiveness in the field of consumer protection.<sup>27</sup>

Nixon appointed a new commission chair and called upon Congress to help revitalize the FTC. Congress did just that by boosting the FTC’s budget and by passing a series of statutes in the 1970s that significantly expanded the

commission's powers. For example, the Federal Trade Commission Improvement Act,<sup>28</sup> which became law in 1975, strengthened the FTC's power to issue sweeping industry-wide rules against certain advertising practices, and it gave the FTC power to sue in U.S. District Court for various forms of redress on behalf of consumers. By the late 1970s, during the zenith of the consumer movement, the FTC was operating as a potent force and was regarded by some as the most powerful of all regulatory agencies in the United States.

In the 1980s, however, in concert with the Reagan administration's emphasis on deregulation, the FTC seemed to back off from its aggressive, proactive role of the 1970s. Critics charged that the agency was abdicating its responsibility to scrutinize sophisticated, national advertising. But others defended the FTC, arguing that regulation had become too aggressive in the 1970s and that some retrenchment was therefore appropriate.

In 1989 the American Bar Association conducted a second study of the controversial FTC. This time, members of the ABA's study panel could not agree on whether the FTC was prosecuting a sufficient number of claims against advertisers. But in its published report, the panel did conclude: "[W]e are united in our belief that the FTC can and should do more to articulate its advertising law enforcement agenda. . . . [T]oo rarely has the public received the message that the FTC believes it is important to move aggressively against false and deceptive advertising."<sup>29</sup>

After a decade of budget cuts, the FTC in the 1990s was not realistically in a position to devote the same amount of staff hours to advertising enforcement as it had in the late 1970s. On the other hand, the FTC during the Clinton administration did prosecute some high-profile claims against major advertisers, and it waged an expensive and exhaustive battle against telemarketing fraud across the country. Many of the FTC's enforcement actions in the 1990s concerned health and nutrition claims about food, and the FTC issued a special Enforcement Policy Statement on Food Advertising.<sup>30</sup> In the late 1990s the FTC also worked to promote closer media screening of weight loss claims ("Operation Waistline") and exercise equipment claims ("Project Workout").

In the early years of the new century, with the attention of the nation and the Bush administration turned toward terrorism, policing advertising was not at the top of the agenda. Pressure had been building, though, to curtail some increasingly annoying tactics of the \$7 billion Internet advertising industry. In 2002 Minnesota became the first state to pass an online privacy law, requiring Internet businesses to obtain consent from consumers before disclosing any personal information to outside parties for marketing purposes. Similar laws were being considered in other states and by Congress. In that environment, the FTC sought to ramp up its own enforcement efforts in cyberspace. As part of a multi-agency initiative, "International Netforce," it pursued online scams perpetrated through so-called spam e-mail advertising and various forms of website advertising.

Early indications were that under the Obama administration the FTC would be at least moderately aggressive in combating questionable advertising. David Vladeck, the commission's new director for consumer protection, said the FTC would continue to focus on health and safety claims, environmental or "green" claims, and ads that unfairly take advantage of consumers during an economic downturn, such as misleading home refinance schemes. The commission also announced that late in 2009 it would enact new, more detailed guidelines on the use of endorsements and testimonials.

### **Procedures**

At FTC headquarters and at ten regional offices around the country, staff members monitor broadcast commercials and examine the advertising in various other media. In addition, the FTC receives complaints about advertising from many sources, including consumers, consumer groups, members of Congress, local government agencies, and the competitors of alleged violators.

When the FTC receives a complaint or its own monitoring discloses a questionable advertisement, it must decide whether to launch a formal investigation. This decision is made on the basis of various criteria, including the apparent seriousness of the problem, the geographic scope of the advertising, and the current status of agency resources. The FTC tends to concentrate on national advertising and on claims relating to health or safety. When a business comes under investigation for potentially deceptive advertising, it may be asked to provide voluntarily a variety of information to the FTC. The agency also has the power to issue subpoenas to compel anyone to appear and testify or to produce documents.

Upon completion of an investigation, the FTC staff recommends a final course of action for the commissioners. One recommendation could be that the matter simply be closed. Another might be that the company in question be asked to agree on an informal settlement—usually by acceptance of a consent order that the company will discontinue the challenged advertising practice.

If the commission determines that a satisfactory voluntary settlement cannot be achieved, it typically will seek a binding **cease-and-desist order** to halt the illegal advertising. This process begins by issuing a formal administrative complaint against the company in question. The case then goes to an administrative law judge within the agency, who conducts a streamlined version of a trial and issues an initial decision to cease and desist. This decision may be appealed to the five-member commission. From the commission, a company's next avenue of appeal is directly to the U.S. Court of Appeals.

As an alternative to the administrative proceeding, the commission may go to U.S. District Court and ask that a federal judge issue an injunction to halt the deceptive advertising. In such proceedings the FTC becomes a plaintiff, acting on behalf of consumers or business competitors.

### ***Jurisdiction***

Article I, Section 8 of the U.S. Constitution gives the federal government power to regulate commerce “among the several States.” The commerce power has been interpreted very broadly by the courts; federal authority extends not only to interstate business activities but to any local activities that may affect interstate commerce. Congress in 1975 expressly passed this broad authority along to the FTC. In the FTC Improvement Act,<sup>31</sup> the commission’s jurisdiction was extended to “unfair or deceptive acts or practices in *or affecting* commerce” [italics added]. In practice, this means that the FTC can crack down on virtually any advertising campaign, no matter how local.

Furthermore, the FTC’s jurisdiction over advertising extends beyond the traditional definition of that term as sponsored messages purchased in the mass media. The FTC may concern itself with any activity intended to draw public attention to a product, service, person, or organization for purposes of trade. Therefore, in addition to regulating magazine ads and television commercials, for example, the FTC may scrutinize product labels, packaging, direct mail, and promotional contests.

## **DECEPTION: THE BASIC ELEMENTS**

Since the early 1980s, the Federal Trade Commission has defined **deceptive advertising**—or any deceptive business conduct—as “a material representation, omission, or practice that is likely to mislead a consumer acting reasonably under the circumstances.”<sup>32</sup> The FTC must show that deception is probable, among reasonable members of the target audience, and that the deceptive content is “material”—that is, likely to be relied upon to the consumer’s detriment (Exhibit 12.1).

Even with this articulated standard, determining whether a particular advertisement is deceptive can be thorny. Again, the application of legal standards

### **EXHIBIT 12.1 What Makes an Advertisement Deceptive?**

According to FTC policy, an ad is deceptive if it contains a message—or an omission—that

1. is likely to mislead consumers acting reasonably under the circumstances,

AND

2. is “material,” meaning important to a consumer’s decision to buy or use the product.

to particular facts is by no means an exact science. In libel law, for example, determining whether a statement is fact or opinion can be quite problematic. The same is true for application of the fair use test in copyright law or the incitement standard in public safety cases. Over the years, however, FTC adjudication of deceptive advertising cases has spawned some important principles for interpreting ads. For the most part these legal principles have been adopted by the states in their own efforts to combat deceptive ads. Some of the most important principles are described in the sections that follow.

### ***Representation or Omission***

The first step in assessing an advertisement for potential deception is to determine what is actually being conveyed by the ad. Ad representations can be express or implied. Naturally, express product claims are the easiest to identify and measure against the truth. For example, an advertisement may not claim that a watch is waterproof unless the watch truly is waterproof, not merely water resistant. Similarly, advertisements could not legally claim that a shampoo cures split ends, that a battery lasts five years, or that a surfboard wax won't melt in the sun—unless the products indeed live up to those claims.

In a national advertising campaign for its Lady Kenmore brand dishwasher, Sears made this express claim: “With a Kenmore you'll never have to scrape or rinse again. Even dishes crusty with leftover food. Kenmore's fourteen powerful hot water jets scour every dish clean . . . with no scraping or pre-rinsing.” Unfortunately, the “no scraping, no pre-rinsing” claim was not true. The claim apparently was made as part of a market “repositioning” strategy for the machine. But even the owner's manual, which customers received after they purchased the dishwasher, contradicted the claim by advising purchasers to soak and scour certain dishes. Therefore, in 1982 the federal Court of Appeals upheld an FTC order requiring Sears to cease and desist from making the claims.<sup>33</sup>

A large portion of the FTC's deceptive advertising cases involve implied representations. Although express claims in advertising are easy to identify, implied representations are often more subtle. Sometimes their very existence is debatable. In determining how consumers would likely interpret an ad, the FTC may rely solely on its own experience and intuition or it may consider such outside evidence as expert testimony or consumer surveys. Once the FTC concludes that the public would interpret an ad to include a particular implied message, however, that message is held up to the same scrutiny as an express claim. The actual intent of the advertiser is generally considered irrelevant, even if the advertiser's motives were entirely innocent.

For example, in the 1950s the FTC issued a cease-and-desist order against a businessman, David Erickson, who referred to himself as a “trichologist” and traveled around the country selling various hair and scalp preparations. Before visiting a city, Erickson would place an advertisement in local papers.

The typical ad contained a picture of Erickson attired in a white lab jacket of the sort customarily worn by and associated with members of the medical profession. The photo showed Erickson pointing to a clinical chart depicting the human scalp. In reality, Erickson had no medical training; his college education was limited to one semester in marketing. Based on the false implications concerning Erickson's credentials, as well as some express product claims about curing baldness, a federal court ordered enforcement of the FTC's order.<sup>34</sup>

Often the implied representation is that the advertiser's product is somehow unique. For example, in the Hypothetical problem at the beginning of this chapter, suppose that a key part of the *Fast-Food Fancy* magazine's promotional pitch was that new subscribers would receive a set of "special VIP discount coupons" for several of the biggest fast-food chains. Though it doesn't directly say so, this implies that the coupon deals are unique for the magazine's subscribers. So if in fact the discounts are identical to those the restaurants are offering to the general public, the promotions could be deemed deceptive.

Because implied representations are scrutinized to the same extent as express claims, an ad may be ruled deceptive even though it is literally true in every respect. For example, Bristol-Myers advertised for a time that doctors recommended the company's pain reliever, Bufferin, more than any other "leading brand" of over-the-counter analgesic. This is literally true. The FTC agreed that during the period of the advertising, doctors recommended Bufferin more than Bayer, Excedrin, and Anacin, the other three leading brands at the time. But the commission also found that the implied message of the ads was that physicians recommend Bufferin more than any other over-the-counter, internal analgesic, not just the three other leading brands. Because doctors in fact recommended Tylenol, Ascriptin, and generic aspirin more often than Bufferin, the FTC found the implied message deceptive and the federal court upheld a cease-and-desist order.<sup>35</sup>

Another principle used in interpreting advertisements is that the overall impact is more determinative than isolated words or phrases. Or, as sometimes stated, text must yield to context. Furthermore, the overall impact of an ad is determined not only from the other words used in the ad but also from its visual messages. For example, a magazine ad might be dominated by a series of large, boldface headings arranged in a question-and-answer format. If the primary effect of the ad comes from these headings, which convey a deceptive message, some fine print wedged between the headings would be insufficient to rescue the ad.

Sometimes an omission of information makes an advertisement deceptive. Of course, the FTC has never required that advertisers disclose everything they know about their products. However, unless they are otherwise informed, consumers may reasonably make a few basic assumptions about advertised products. It is generally expected, for example, that advertised goods are new and in undamaged condition. If, in fact, the products being advertised are secondhand or flawed, failure to disclose this information in advertising will be deemed a deceptive omission.



Furthermore, if the nondisclosure is relevant to a point that the ad itself raised, the FTC has tended to insist that the full picture be conveyed. For example, the J. B. Williams Company used TV and print media to advertise its product, Geritol liquid and tablets, for the relief of iron deficiency anemia. The ads emphasized that consumers who often feel tired and rundown may have “iron-poor blood” and that taking Geritol would make them feel stronger, fast. Looking at the overall impression created by the ads, the FTC found they were deceptive for their failure to disclose that for most people suffering from tiredness, the symptoms are not caused by iron deficiency and that Geritol would be of no benefit in such cases. The FTC therefore ordered that the advertiser affirmatively disclose this limiting fact whenever claiming generally that Geritol is an effective remedy for tiredness.<sup>36</sup>

### ***Likely to Mislead Reasonable Consumer***

In determining whether an advertisement is likely to mislead, the FTC will consider the characteristics of the specific audience at which the ad was targeted. For example, suppose the challenged ad is one for a dietary supplement and that it appeared in a medical journal circulated to physicians and a few other health professionals. The FTC would take into account the specialized background and sophistication of the readers in judging whether they would likely be misled. The ad in the medical journal might be deemed acceptable, even though the same ad, if placed in a supermarket tabloid, might be found deceptive. Conversely, advertisements aimed at young children will be judged in light of the immature nature of that target audience.

Aside from the consideration of the actual audience, however, the test of likely deception is an objective one. The commission considers whether a so-called reasonable member of the targeted group would likely have been misled under the circumstances. Again, this is an objective standard in the sense that it is not dependent upon how consumers actually reacted on a particular occasion. In theory, an ad could be ruled deceptive even if no consumer was actually misled by it; or, an ad might be deemed nondeceptive even though some consumers were misled. The FTC will not rule an ad illegal simply because some consumers interpreted the ad in an irrational fashion. But it is possible for an ad to have more than one reasonable interpretation.

One type of advertising claim that the FTC categorically will not rule deceptive is called **puffery**, or puffing. The term refers to the kind of commonplace, exaggerated sales talk that consumers should expect to encounter in the marketplace and that reasonable shoppers would know better than to rely upon. Put another way, puffery refers to the kind of product claims for which consumers would not expect to find factual documentation.

Sometimes it is difficult to distinguish between language that is mere puffery and that which an advertiser must be prepared to document. Generally, though,

puffery comes in two forms. The first is general, subjective statements about a product's superiority. These claims by their very nature are not subject to verification—that a particular spaghetti sauce is the “best” available, that a new sports car is the “sexiest” model on the market, that a computer game is “terrific,” or that a brand of bicycle is “in a class by itself,” for example.

The second main form of puffery includes claims that are simply too exaggerated to be taken literally. This would include, for example, the statement that a sewing machine “is almost human,” or that a brand of golf ball “will reach the stratosphere.” As noted earlier, sometimes literal truth will not prevent an ad from being ruled deceptive. Conversely, under the puffery principle, literal falsehood does not necessarily make an ad deceptive.

### **Materiality**

Even if an advertising message is likely to mislead the public, the ad is not illegally deceptive unless the misleading claim is a material one. A **material representation** is one that is likely to influence a consumer's choice of a product or service. Express claims that in any way relate to an advertiser's product are generally presumed to be material. Implied claims are also presumptively material if they concern health or safety or if they relate to central characteristics of the product, such as its quality, cost, or performance. The courts generally have been willing to defer to the commission's expert judgment on whether a particular representation is material.

The materiality issue sometimes arises in cases involving product demonstrations, or mock-ups. A classic example is *Federal Trade Commission v. Colgate-Palmolive Co.*, a case from the early 1960s that went all the way to the U.S. Supreme Court. The case arose from a television ad campaign in which Colgate-Palmolive attempted to demonstrate that its shaving cream, Rapid Shave, could outshave all the rest. In a series of one-minute commercials, Rapid Shave was depicted as so effective that it could soften even the toughness of sandpaper. The announcer informed the audience: “To prove Rapid Shave's super-moisturizing power, we put it right from the can onto this tough, dry sandpaper.” As the announcer continued speaking, Rapid Shave was applied to a substance that appeared to be sandpaper; immediately thereafter a razor was shown shaving the surface clean.

However, the substance resembling sandpaper was in fact a simulated prop, or mock-up, made of a Plexiglas acrylic sheet to which sand had been applied. The Federal Trade Commission issued a complaint against Colgate and its advertising agency, charging that the commercials were deceptive. At the initial hearing, an administrative law judge found that Rapid Shave could indeed shave sandpaper, though not quite as fast as in the commercials, and that the main reason real sandpaper had not been used in the ads was that television transmission made sandpaper look like nothing more than plain, colored paper on the TV screen. The administrative judge therefore dismissed the complaint on the ground that the mock-up misrepresentation was not a material one.

But the full commission saw things differently. The FTC ruled that the undisclosed use of the Plexiglas sheet in the commercials was itself a material, deceptive practice—independent of underlying product claims. The Supreme Court agreed. It held that, even if an advertiser has successfully conducted a test that proves a certain product claim, the advertiser may not convey to television viewers the false impression that they are seeing the test for themselves. Wrote Chief Justice Earl Warren for the Court:

It has long been considered a deceptive practice to state falsely that a product ordinarily sells for an inflated price but that it is being offered at a special reduced price, even if the offered price represents the actual value of the product and the purchaser is receiving his money's worth. . . .

It has also been held a violation of §5 [of the FTC Act] for a seller to misrepresent to the public that he is in a certain line of business, even though the misstatement in no way affects the qualities of the product. . . .

It is generally accepted that it is a deceptive practice to state falsely that a product has received a testimonial from a respected source. In addition, the Commission has consistently acted to prevent sellers from falsely stating that their product claims have been “certified.” We find these situations to be indistinguishable from the present case. We can assume that in each the underlying product claim is true and in each the seller actually conducted an experiment sufficient to prove to himself the truth of the claim. But in each the seller has told the public that it could rely on something other than his word concerning both the truth of the claim and the validity of his experiment. We find it an immaterial difference that in one case the viewer is told to rely on the word of a celebrity or authority he respects, in another on the word of a testing agency, and in the present case on his own perception of an undisclosed simulation.<sup>37</sup>

The Court in *Colgate* distinguished a hypothetical scenario in which a commercial extolled the goodness of ice cream while giving viewers a picture of a scoop of mashed potatoes appearing to be ice cream. Wrote Justice Warren:

In the ice cream case the mashed potato prop is not being used for additional proof of the product claim, while the purpose of the Rapid Shave commercial is to give the viewer objective proof of the claims made. If in the ice cream hypothetical the focus of the commercial becomes the undisclosed potato prop and the viewer is invited, explicitly or by implication, to see for himself the truth of the claims about the ice cream's rich texture and full color, and perhaps compare it to a rival product, then the commercial has become similar to the one now before us. Clearly, however, a commercial which depicts happy actors delightedly eating ice cream that is in fact mashed potatoes or drinking a product appearing to be coffee but which is in fact some other substance is not covered by the present [cease-and-desist] order.<sup>38</sup>

## PRIOR SUBSTANTIATION

In addition to the general standards for deception, the FTC has enforced an adjunct requirement called the **prior substantiation doctrine** since 1971. Under this doctrine, advertisers must have reasonable evidence for all verifiable product claims before the claims are made. If an advertiser makes a claim without first possessing substantiation, it is considered a violation of section 5 of the FTC Act—even if subsequent evidence shows that the product claim turned out to be true.

For example, in *Firestone Tire & Rubber Co. v. FTC*, the advertiser had claimed that its Wide Oval tires “stop 25 percent quicker.” The FTC ruled that the advertisements were deceptive because they were made without adequate substantiation. In upholding the commission, the Court of Appeals wrote: “We are by no means sure that the Firestone Wide Oval tire does not ‘stop 25 percent quicker.’ But that is not our question.”<sup>39</sup> Instead, the question was simply whether the claim was backed by the kind of evidence that consumers would expect upon hearing such claims.

The rationale behind the prior substantiation doctrine is that consumers cannot realistically make the kinds of tests or investigations necessary to determine whether product claims are actually true. Advertisers, on the other hand, often do possess the resources and expertise to conduct or commission thorough testing of their products. Therefore, it is considered fair and prudent public policy to place the burden of substantiation upon advertisers rather than consumers.

Shortly after the prior substantiation doctrine was instituted, the FTC sent documentation demands to some entire industries, such as automobiles, tires, cold remedies, antiperspirants and deodorants, soaps, shampoos, and pet foods. Thus the FTC obtained data to help it detect unfounded claims, and the substantiation program probably helped to deter groundless statements in advertising. But usually the FTC issues substantiation demands in a more narrowly targeted, case-by-case fashion. A substantiation order is typically the commission’s first step in dealing with an advertiser about which it has received complaints.

How much evidence is needed to satisfy the prior substantiation requirement? This depends on the type of claim being made. A general standard applies whenever objectively verifiable advertising claims are made without reference to any specific level of proof. In all such cases, the advertising claim must be supported in advance by a reasonable basis for believing the claim is true. A reasonable basis does not necessarily mean irrefutable, scientific proof; the question is simply whether sufficient evidence had been gathered to satisfy a reasonably prudent business-person.

When an advertisement itself represents that a product claim is supported by a particular level of proof, however, that particular level of proof must indeed be present. For example, if an ad refers to a “scientific report,” a “major



### Is the Ad Deceptive?

- What factual representation does the ad convey, either expressly or by implication?
- Are those representations true or false?
- If false, are the representations *material* and likely to mislead reasonable members of the target audience?
- Does the advertiser possess reasonable, prior substantiation to support its claims?

university study,” a “survey of dentists,” a “laboratory test,” or a “medically proven” technique, the consumer is led to a heightened level of expectation that must be substantiated. These specific level-of-proof claims may also arise through visual implication. In a TV commercial, for instance, the use of white-coated technicians might suggest that the product claims are backed by scientific tests.

In the *Firestone Tire* case mentioned earlier, the FTC concluded that by making a broad 25-percent-quicker-stopping pledge, Firestone had implied that comprehensive scientific tests were the basis for the claim. Therefore, substantiation had to take that particular form. Upon investigation the FTC found that although tests had indeed been conducted, they were extremely limited in scope and were performed on a surface uncommon to American roadways. Given the sweeping nature of the advertising claim, the commission ruled that Firestone’s substantiation was entirely inadequate to meet consumers’ expectations.

Health and nutrition claims have been particularly easy targets for the FTC. Two cases from 2009 will illustrate: In one case, Kellogg Company had represented that “eating a bowl of Frosted Mini-Wheats cereal for breakfast is clinically shown to improve children’s attentiveness by nearly 20 percent.” The claim was made in TV commercials, on the Mini-Wheats website, and in news releases that cited a study commissioned by Kellogg. The FTC examined the study, however, and found that the results had been greatly overstated. The commission’s final consent order stipulated that Kellogg would not state or imply that eating Mini-Wheats improves attentiveness by any specific percentage.<sup>40</sup>

In the second case, Constellation Brands, a major U.S. alcohol supplier, had represented in website videos and other Internet advertising that the caffeinated alcohol drink Wide Eye will help people remain alert, even when consuming alcohol. The FTC found that not only was the claim unsubstantiated but it fueled a common misconception about mixing caffeine with alcohol and was a potentially dangerous message. In the FTC’s proposed consent agreement, Constellation Brands would refrain from any representations that consuming such a product would keep people alert when drinking alcohol, “unless the representation is true, non-misleading, and,

at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.”<sup>41</sup>

## FTC RULES AND GUIDES

In addition to the general standards of deceptive advertising and the doctrine of prior substantiation, the FTC has promulgated scores of trade regulation rules and industry guides that brand particular kinds of advertising practices as deceptive. Both the rules and the guides, which are published in the Code of Federal Regulations, are intended to give greater specificity and clarity to the broad standard of deceptive advertising.

When the FTC enacts **trade regulation rules**, it engages in formal, administrative lawmaking. The rules, passed in open proceedings following a public notice and comment period, become binding law in their own right. The functional effect of these rules is to narrow the inquiry conducted in a deceptive advertising proceeding. Instead of adjudicating whether an advertiser violated the general and somewhat vague standards of deceptive trade practice, the inquiry is simply whether the defendant’s ads violated the particular rule in question. If so, a cease-and-desist order will be issued. The trade regulation rules tend to be tailored to the problems of specific industries. For example, one rule declares that it is unlawfully deceptive for retail food chains to advertise products for sale in an area served by any of their stores that do not actually have the products in stock. Another rule lists a host of restrictions on how the retail gasoline industries may advertise games of chance for consumers.<sup>42</sup>

The **industry guides** issued by the FTC are designed to serve an educational, preventive function. Unlike the rules enacted by the FTC, the guides do not, technically speaking, have the status of law. The guides essentially are official, administrative interpretations of the law. The guides serve to put advertisers on notice that certain practices will be interpreted as violating the general deceptiveness standards and that the FTC will be inclined to file a complaint. As with the rules, many of the industry guides are designed for specific industries, such as pet food, tires, wristwatches, and even law book publishing. Several of the guides, however, are of general applicability to all industries. A few of the more important guides are summarized in the sections that follow.

### **Pricing**

The FTC has published several guides pertaining to deceptive pricing. One of these guides addresses “former price comparisons”—the common advertising practice of offering a reduction from the advertiser’s own former price for a product.

This is acceptable as long as the advertised former price is the actual price at which the product was offered to the public on a regular basis for a reasonably substantial period. The comparison is considered deceptive if the advertised

former price is a fictitious, inflated one, established for the sole purpose of enabling the later offer of a huge, “bargain” reduction.

Another guide counsels on the use of the phrase “manufacturer’s suggested retail price” or similar terms. Consumers have a right to assume that when a reduction from the suggested retail price is advertised, they will be getting a genuine bargain. Therefore, this form of advertising is considered deceptive if the suggested retail prices do not in fact correspond to prices at which a substantial number of sales were actually made. In other words, the manufacturer’s list price cannot be a sham figure established merely to set up a deceptive, attention-grabbing comparison in local advertising campaigns.<sup>43</sup>

Use of the word *free* is also addressed in one of the FTC’s published guides. When advertising claims such as “Buy 1—Get 1 Free” or “2-for-1 Sale” are made, consumers have a right to expect that they will actually pay nothing for the article represented to be free. Therefore, “a purchaser has a right to believe that the merchant will not directly and immediately recover, in whole or in part, the cost of the free merchandise or service by marking up the price of the article which must be purchased, by the substitution of inferior merchandise, or otherwise.”<sup>44</sup>

### **Guarantees**

Several guides speak to the advertising of warranties and guarantees. For example, if an ad mentions that a written warranty or guarantee is offered on an advertised product, the ad is also supposed to disclose that, prior to sale, prospective purchasers can see the warranty for complete details of its coverage. The guide recommends disclosure such as the following:

The XYZ bicycle is warranted for 5 years. *Some restrictions may apply. See a copy of our warranty wherever XYZ products are sold.*

The guide also recommends that if the term lifetime or life is used to describe the duration of a warranty or guarantee, the advertisement should disclose the life to which this representation refers. For example, is it the life of the product, the life of the purchaser, or the life of the purchaser’s dog or cat?<sup>45</sup>

### **Endorsements**

An elaborate set of guides pertains to the use of product endorsements. An **endorsement** means any advertising message that consumers are likely to believe reflects the opinions or findings of a party other than the sponsoring advertiser. In 2009 the FTC significantly updated and strengthened its Guides Concerning the Use of Endorsements and Testimonials in Advertising, which now specifically cover blogging or other online endorsements.

As general considerations, the FTC advises that endorsements must always reflect the honest beliefs or experience of the endorser and that they may not contain any representations that could not be substantiated if made directly by

the advertiser. Furthermore, if an advertisement represents that the endorser uses the endorsed product, the endorser must indeed have been a legitimate user—both at the time the endorsement was given and throughout the period of the advertising campaign. This, you may recall, was another potential problem with the Hypothetical problem for this chapter: The professional bowler who endorsed fast food and *Fast-Food Fancy* might meet the standard for endorsements, but you would be unwise to post the commercial until you know for sure that the bowler is a reader of the publication.

Separate guides speak to the use of consumer endorsements and expert endorsements. For example, if a TV commercial presents endorsements by people who are represented as actual consumers, the ad should indeed use actual consumers—in both the audio and video portions of the commercial. Also, a consumer's endorsement should be used in an ad only if that consumer's experience is representative of what consumers generally will experience with the product.

As to experts, the FTC endorsement guides warn that whenever an ad represents, directly or by implication, that an endorser is an expert with respect to views conveyed, the endorser must indeed have the kind of expertise represented. Also, if the endorser makes claims about particular product features, the endorser must actually have exercised her expertise in evaluating the product. For example, an endorsement of a particular automobile by a person described as an engineer would imply that the endorser's training is in the design and performance of cars. If the endorser's field actually is chemical engineering, the endorsement would be deceptive.<sup>46</sup> See Exhibit 12.2 for an example of a faulty endorsement and other deception problems that caught the eye of the FTC.

In recent years the Internet opened up a new range of possible endorsement vehicles, most notably blogs. And in many cases the endorsements were appearing in more subtle and sneaky ways than the typical endorsement in traditional media. Prompted largely by the proliferation of undisclosed commercial pitches in blogs, the FTC began a multi-year effort to revise the endorsement and testimonial guides and provide updated examples. The revised guides became effective, amid some controversy, in December 2009. Among the new examples is this one, in the section pertaining to “disclosure of material connections”:

A college student who has earned a reputation as a video game expert maintains a personal weblog or “blog” where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. The readers of his blog are unlikely to expect that he has received the video game system free of charge in exchange for his review of the product, and



**EXHIBIT 12.2** Sample Case: *FTC v. SlimAmerica, Inc.* 77 F. Supp.2d 1263 (1999)**The Facts**

In 1995 SlimAmerica began promoting a weight loss program called the Super-Formula Program, consisting of three separate diet pills. Ads for the product appeared in hundreds of newspapers and magazines, making such claims as the following:

*"Yes, utterly amazing as it seems, someone has finally combined three of the world's most powerful weight-loss weapons ever into one explosive Super-Formula Program that is absolutely guaranteed to blast up to 49 pounds off you in only 29 days!"*

*"Blasts Away Up to 50% of Your Body Fat in Record Time . . . Obliterates Up to 5 Inches From Your Waistline . . . And Zaps 3 Inches From Your Thighs Before You Know It."*

Some of the ads also contained an endorsement from a physician, who was identified as a past president of the American College of Nutrition. Next to the endorsement appeared a photo of a man in a white coat.

The Federal Trade Commission sued for an injunction against SlimAmerica's advertising and for consumer restitution.

**The Holding**

At least four of SlimAmerica's express and implied claims were held deceptive and in violation of federal law:

**Weight loss claims:** The ads represented that Super-Formula users would lose specified weight amounts in a brief time without dieting or exercise.

This representation was false. Evidence shows that to lose one pound of weight, the average person needs a deficit of about 3,500 calories between caloric intake and output. "Although drugs may make it easier to achieve this deficit, they cannot alter this basic equation."

**Size reduction claims:** The ads represented that Super-Formula would cause substantial, specified reductions of waist and thigh sizes without dieting or exercise. Again, false. "There is no plausible scientific or medical evidence supporting claims that diet products can make size reductions exclusively from specific areas of the body."

**Lack of substantiation:** The ads implied that the weight loss and size reduction claims had been scientifically validated in clinical studies. But they were not. To the extent SlimAmerica provided any studies, they were filled with serious methodological and technical flaws. The only blind study of the Super-Formula ingredients, completed pursuant to a court order, showed that subjects who took a placebo fared nearly as well.

**The endorsement:** Ads represented that the product was endorsed by a former president of a recognized physicians' organization specializing in nutrition. But in fact, the physician, who had retired nearly twenty years earlier, had never even been a member of the organization. Further, the accompanying photo was that of a younger man who was not the physician.

Therefore, the FTC's request for an injunction was granted, and SlimAmerica was ordered to pay more than \$8 million for consumer restitution.

given the value of the video game system, this fact would likely materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.<sup>47</sup>

In this example, which has implications for the blog-publicity campaign described in the Hypothetical that began this chapter, the FTC's logic seems clear enough. Yet the mere idea that the federal government would now be scrutinizing the content in such a nontraditional and heretofore informal medium raised many eyebrows. Some viewed the expanded guide as an intrusion on First Amendment rights. Others speculated that many unsuspecting fourteen-year-old bloggers would be caught in the sights of the FTC's new scrutiny of the Internet. At the time of enactment, however, FTC officials stated that enforcement would focus on advertisers supplying the merchandise, not on bloggers.

## FTC ENFORCEMENT DEVICES

For the most part, compliance with the laws against deceptive advertising is obtained through voluntary and cooperative action. This cooperation is achieved by way of FTC staff advice to businesses, advisory opinions issued by the commission, and the publication of industry guides. But in some cases the FTC resorts to formal litigation to obtain binding orders against offenders. The most common enforcement tools used by the FTC include the following:

- **Cease-and-desist orders.** An FTC cease-and-desist order is similar to an injunction, except that it is issued by the commission, not by a court, following a formal hearing. Each order details the specific advertising practices to be prohibited. If a cease-and-desist order is violated, the FTC can levy fines against the advertiser. Sometimes after the FTC begins cease-and-desist litigation, but before the commission makes a formal ruling, the advertiser agrees to settle. In this case the advertiser agrees to an FTC **consent order**, which has the same binding effect as a cease-and-desist order. Most FTC cases end in a consent order.
- **Corrective advertising.** In some cases, the FTC may order an advertiser to make certain disclosures in future ads for the purpose of clearing up the false impressions caused by prior deceptive advertising. Such **corrective advertising** can be highly embarrassing for the advertiser, but it is deemed appropriate if the deceptive advertising campaign would otherwise leave long-lasting misconceptions in consumers' minds. For example, in the late 1970s the FTC ordered Warner-Lambert Company to conspicuously state in its future advertising for Listerine mouthwash: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity."<sup>48</sup> The order applied to the next \$10 million of Listerine advertising—roughly one year's worth.
- **Court injunctions.** The FTC also has authority to seek the imposition of certain remedies by a federal District Court. One of these remedies is an injunction—a valuable remedy for the FTC because it can be obtained fairly quickly. Via injunction, an allegedly deceptive advertising practice can be halted temporarily, pending the outcome of the commission's own adjudicative procedure.

- **Civil and criminal penalties.** The FTC may seek court imposition of civil penalties against any person or business entity that knowingly violates a trade regulation rule. Each violation can bring a maximum penalty of \$10,000. Furthermore, each day that a defendant remains in noncompliance may be treated as a separate violation. When the falsely advertised products are food, drugs, or cosmetics and there is an intent to mislead, the advertiser may be convicted of a misdemeanor. First offenses are punishable by up to \$5,000 or six months' imprisonment.

Though these remedies give the FTC Act some sharp teeth, note that the remedial power rests exclusively with the commission. Courts have held consistently that no private lawsuit can be maintained for violation of the FTC Act. In other words, consumers or business competitors who believe they have been damaged by deceptive advertising cannot personally sue the offending advertiser under the act; they must rely on the FTC to act.

## LANHAM ACT LAWSUITS

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The Lanham Act was described in Chapter 8 as the federal government's trademark protection law. In addition to trademark protection, however, section 43(a) of the act provides businesspeople with a legal tool against false advertising by others in the marketplace. Section 43(a), as revised in 1988, reads in part as follows:

Any person who . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.<sup>49</sup>

Thus section 43(a) specifically authorizes private party, civil lawsuits in federal court based upon false advertising of goods or services sold in interstate commerce. As federal courts have described it on several occasions, section 43(a) of the Lanham Act creates a "distinct federal statutory tort designed to afford broad protection against various forms of unfair competition and false advertising."<sup>50</sup> A typical use of this statute is a lawsuit by a business against one of its competitors, alleging false comparative advertising.

The statute uses the language "any person . . . likely to be damaged" in describing who may file a lawsuit. However, courts generally have held that this language does not include consumers. Consumers do not have authority to file lawsuits under section 43(a), the judicial reasoning goes, because the Lanham Act was enacted exclusively to protect commercial interests from unscrupulous commercial conduct.

The Lanham Act, then, is a federal vehicle, used with increasing frequency in the last decade or so by people or businesses to sue others for competitive harm inflicted by false advertising. The plaintiff need not be in direct business competition with the alleged violator, though plaintiffs often are. The ability to file a Lanham Act lawsuit is predicated simply on whether the plaintiff suffered some harm to its competitive position in the marketplace.

For example, you may recall from Chapter 5 the 1988 case in which filmmaker Woody Allen sued a clothing store for unauthorized exploitation of his identity by use of a convincing look-alike in a magazine ad. A federal court awarded summary judgment to Allen based on section 43(a) of the Lanham Act, even though Allen was not in competition with the clothing store. It was enough, the court said, that the defendant misrepresented its relationship with Allen and that the misrepresentation could damage Allen's stature in the marketplace.<sup>51</sup>

## ELEMENTS OF A CLAIM

A false advertising claim under section 43(a) of the Lanham Act rests on the following elements:

1. A false representation of fact made by an advertiser about a product or service
2. A representation that deceives, or has a tendency to deceive, a substantial segment of the intended audience
3. A representation that is material, in that it is likely to influence purchasing decisions
4. A false representation that results or is likely to result in injury to the plaintiff

These elements are similar to those that the FTC must prove when it prosecutes a deceptive advertising case. The most significant difference is that the particular plaintiff in a Lanham Act case must prove that it is, in fact, likely to be injured commercially by the defendant's false and misleading ad claims.

The plaintiff must prove that a challenged advertising claim is actually false. To accomplish this, of course, a particular claim must be identified and then tested. In Lanham Act cases, the falsity element cannot be proved by a mere showing that the advertiser lacked substantiation.

As with FTC prosecutions, a Lanham Act case can attack either explicit product claims or an advertiser's implied product claims, as they would be understood by the target audience. The existence of implied claims is typically established in court through consumer survey evidence that shows how the targeted consumers interpret the advertisement. Once the existence of implied promises is established, they, too, must meet the truthfulness requirement of section 43(a).

## SAMPLE CASES

Business enterprises tend to be quite vigilant of their competitors' advertising, as a few Lanham Act cases illustrate.

Tambrands, manufacturer of a twenty-minute home pregnancy test kit called First Response, sued a competitor for false and misleading advertising in 1987. The competitor, manufacturer of the E.P.T. Plus pregnancy test kit, claimed in national advertising that users would learn for sure whether they are pregnant "in as fast as ten minutes." However, the federal District Court found that although positive results generally were available in ten minutes, negative results could not be confirmed until thirty minutes had elapsed. This was significantly misleading because more than half the women who purchase the kits want to confirm that they are not pregnant. For these purchasers, the kit was, in truth, a thirty-minute test. The court therefore issued an injunction prohibiting the competitor from advertising that its kit was a ten-minute test or that its kit was the "fastest" on the market.<sup>52</sup>

Another Lanham Act case involved the two leading national competitors in the ready-to-serve orange juice market. Tropicana Products had aired a thirty-second television commercial described by the federal Court of Appeals as follows:

The commercial shows the renowned American Olympic athlete Bruce Jenner squeezing an orange while saying "It's pure, pasteurized juice as it comes from the orange," and then shows Jenner pouring the fresh-squeezed juice into a Tropicana carton while the audio states "It's the only leading brand not made with concentrate and water."<sup>53</sup>

Coca-Cola Company, maker of Minute Maid orange juice, sued Tropicana for false advertising under the Lanham Act. Coke claimed the ad was false because it represented that Tropicana's product contained unprocessed, fresh-squeezed juice when in fact the juice is heated to 200 degrees Fahrenheit (pasteurized) and then sometimes frozen prior to packaging. The Court of Appeals found that the ad indeed made a false representation, that the representation could cause consumers to change their product choice and therefore injure Coke, and that Coke was likely to prevail in the lawsuit. The court therefore directed the trial judge to issue a preliminary injunction in favor of Coke.

In a 2002 case, Spalding Sports Worldwide sued its arch competitor, Wilson Sporting Goods, claiming that Wilson falsely advertised that its golf balls are "perfectly balanced" and implied that Wilson's golf balls will roll straighter than Spalding balls under actual playing conditions. Wilson's TV and print ads claimed that Wilson Staff True is "golf's first perfectly balanced ball" and used the slogan "Putts truer. Flies longer." In the TV ad, viewers also saw a man in a lab coat testing Wilson and Spalding balls by placing them in a mechanized putting device that rolled the balls along a very slick, fast surface. Viewers saw the Wilson ball

roll into the hole and saw the Spalding ball miss. Spalding hired an outside expert to conduct a test more closely simulating the surface of an actual putting green and found no significant balancing difference between the two brands. Spalding therefore argued that Wilson could not substantiate the implied claim that Wilson balls will roll truer in actual playing conditions.

The federal District Court declined to issue a temporary restraining order, however, because Spalding had not shown a likelihood of prevailing at trial. The court said the Wilson ad's implication was merely that Wilson balls will roll straighter than some Spalding balls under actual playing conditions and that this isn't necessarily false. Though the Wilson test surface was artificially fast, it would not create the pull a ball would feel toward its heavy side but would only exaggerate that effect. Consumers would assume this, the court said. So, the complicated case involving golf ball physics was expected to move forward to trial.<sup>54</sup>

## PLAINTIFF'S REMEDIES

A variety of legal remedies are available to victorious plaintiffs in Lanham Act lawsuits. These remedies include injunctions, corrective advertising orders, product recalls, and monetary damages.

By far the remedy most likely to be obtained is an injunction prohibiting the defendant from continuing its false advertising. Actually, injunctive relief is often dished out in two stages. The first stage is a temporary restraining order and/or preliminary injunction. To secure a preliminary injunction the plaintiff must convince a judge that the defendant's advertising is causing irreparable harm to the plaintiff and that ultimately the plaintiff is likely to prevail at trial. In order to demonstrate irreparable harm, plaintiffs typically argue that the offending advertising confuses consumers and diverts customers from the plaintiff. The value of a preliminary injunction is that it can be obtained quickly. A preliminary injunction stops an offending ad campaign in its tracks, sometimes months before a full-scale proceeding is held to determine whether the advertising is, in fact, unlawful. If a trial formally concludes that the defendant's advertising is false and misleading, the court will issue a permanent injunction.

Of the other remedies available in Lanham Act cases, the one that is most commonly sought is monetary damages. However, damages are rarely awarded. This is because a tougher standard of proof applies to damage claims than to requests for injunctive relief. To obtain damages, a plaintiff must show that purchasers were actually deceived by the defendant's false advertising and that this deception caused direct injury to the plaintiff. This standard is difficult to prove. If it is proved, however, a defendant can be ordered to compensate the plaintiff for lost sales. In cases against national advertisers, this compensation could amount to millions of dollars.

## STATE ADVERTISING LAWS

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All fifty states have enacted their own statutes prohibiting false advertising and other deceptive business practices. Remember that the area of commercial speech regulation is shared between the federal government and the states. The theory is that this shared jurisdiction will result in an effective regulatory partnership: The federal government will naturally serve as the premier regulator of national advertising, the presumption goes, and the states will complement these efforts by scrutinizing local and regional advertising. In the 1980s, however, as the Federal Trade Commission was perceived as retreating from a decade of zealous (some would say overzealous) regulation, the states began to play an increasingly prominent role in regulating local and national ads alike.

The state statutes are sometimes called baby FTC acts, because they typically are modeled to some extent on the federal FTC Act.<sup>55</sup> Furthermore, the state courts, when ruling on questions of deception under state law, are often guided by federal interpretations of the FTC Act. States are not actually bound by interpretations of the federal law, however. A state might declare a certain advertising practice unlawful even though it has not been declared so by federal authorities. Also, considerable variation exists among the states with respect to their statutory definitions of advertising, the government offices designed to enforce the law, and the kinds of legal remedies available.

As a general rule, state enforcement efforts are considered a valid exercise of joint jurisdiction unless the state efforts are actually counterproductive to the federal government's statutes and regulations. In some cases, comprehensive federal regulation of particular industries has been held to preempt state regulation.

## GOVERNMENT PROSECUTION

Governmental responsibility to enforce state antideception statutes may be vested in a state attorney general, local criminal prosecutors, a separate state agency, or some combination. Authorities may be empowered to obtain injunctions, sue for civil penalties, or prosecute false advertising as a misdemeanor.

Traditionally, state advertising statutes were rarely enforced, because attorneys general and local prosecutors have many other law enforcement responsibilities that, quite frankly, are seen as higher priorities. However, state regulatory efforts have gained greater stature in recent years as the states have joined forces to combat large-scale advertising problems.

Some of the coordinated state effort has come from the National Association of Attorneys General (NAAG). This organization has no legal authority to pass laws, but has, on several occasions, passed resolutions or guidelines pertaining to misleading advertising. Some resolutions, for example, have asked the federal

government to investigate a particular advertising practice. On other occasions, NAAG has passed guidelines to warn advertisers that certain practices are likely to be prosecuted by the various state attorneys general under the states' laws against false and misleading advertising.

Another vehicle for state cooperation has been multi-state enforcement campaigns. Several states occasionally will agree to collectively pursue a particular advertiser, or group of advertisers, under the states' false advertising statutes. Typically the various state attorneys general prosecute the claims, but these multi-state enforcement efforts are quite separate from the advisory efforts of NAAG. Which states take part in a multi-state enforcement campaign depends on the nature of the problem and the geographic region in which the questionable advertising is most prevalent. Recent multi-state enforcement efforts have been aimed at food advertising and at ads that make environmental claims, for example.

## PRIVATE LAWSUITS

Unlike the federal FTC Act, most of the state antideception statutes authorize private lawsuits against advertisers; enforcement does not depend exclusively on the vigilance and resources of government officials. Furthermore, unlike the Lanham Act, most state laws provide that lawsuits may be filed by consumers, not just by people who suffer competitive harm.

In most states, a plaintiff who sues for false advertising may sue for an injunction or for compensatory damages. If the advertiser willfully attempted to mislead, plaintiffs may be awarded an additional sum in the form of punitive damages. Some state statutes also authorize consumers to file class actions against illegal advertisers. A **class action** is a kind of lawsuit in which one or more named plaintiffs sue as representatives of a large number of people, all of whom share a similar complaint against the defendant. For example, a class could include thousands of consumers who presumably were induced to buy a particular product by false and misleading advertising claims.

## FEDERAL PREEMPTION

If a state advertising law aims to restrict truthful ads, then it can be challenged under the First Amendment. But another way advertisers have combated state controls—whether they pertain to truthful or deceptive advertising—is by raising the issue of federal preemption. Some federal statutes contain language that specifically reserves an area of regulation exclusively for the federal government.

For example, both NAAG and a multi-state enforcement effort had their sails trimmed by the Supreme Court, on preemption grounds, in *Morales v. Trans World Airlines, Inc.*<sup>56</sup> The case arose from airline advertising guidelines adopted



by NAAG that stipulated any fuel tax or other airfare surcharge must be included in advertised fare prices. The attorneys general of Texas and a few other states sent letters to TWA, Continental, and British Air, notifying them that some of their ads were contrary to the NAAG guidelines and were considered in violation of those states' false advertising laws. The airlines sued to enjoin prosecution, arguing that any state regulation on advertising of airlines' rates was preempted by federal law.

The Supreme Court agreed. In the 1992 ruling the Court held that enforcement of the NAAG airfare advertising guidelines through state consumer protection laws was preempted by the Airline Deregulation Act of 1978. A section in that act specifically prohibits states from enforcing any law relating to airline rates, routes, or services, and that was held to include laws on the advertising of rates. The purpose behind the preemption provision was to give airlines, which typically operate across many states, a single regulator in matters pertaining to rates.

Some state and local attempts to regulate cigarette advertising have also been held to be preempted. This is because the Federal Cigarette Labeling and Advertising Act contains a preemption clause that reads: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes."<sup>57</sup> In one case, the U.S. Court of Appeals invalidated a New York City ordinance that had banned tobacco advertising on taxis unless anti-smoking, public health messages were also displayed. The court noted that the ordinance was enacted for the laudable purpose of warning the public about the dangers of smoking. Nevertheless, the law ran afoul of the express federal statute that sought to establish national uniformity in cigarette advertising rules.<sup>58</sup>

In contrast, however, the California Supreme Court held that a civil lawsuit by several California cities and counties against R. J. Reynolds Tobacco Co. and its old Joe Camel ad campaign was not preempted. The lawsuit alleged that the ad campaign targeted minors and induced them to make illegal cigarette purchases. (In California it is illegal for minors to purchase cigarettes.) The claim was filed under a general state statute prohibiting unfair business practices. The state's high court construed the federal preemption clause narrowly and held that the claim against R. J. Reynolds was not preempted because it was not actually a legal action "based on smoking and health," the words used in the federal preemption section. Rather, the court said, the legal claim was predicated on a more general obligation not to engage in unfair competition by advertising illegal conduct or encouraging others to violate the law.<sup>59</sup> In 1997, R. J. Reynolds agreed to pay \$10 million in a settlement and also agreed to suspend its Joe Camel campaign.

Meanwhile, in the mid-1990s state after state began filing lawsuits against the major cigarette makers to recover Medicaid money spent treating people with smoking-related illnesses. In 1998 the cigarette industry and the states agreed to

a settlement—the biggest legal settlement in U.S. history. The cigarette makers would pay \$206 billion to the states over twenty-five years. But in addition, the deal called for several restrictions on advertising. For example, the industry agreed to a phased-in ban on billboard ads, transit ads, clothing with brand logos, and cartoon characters in advertising. Because these restrictions were part of a negotiated settlement, not state regulation, they do not run afoul of federal preemption.

## MARKETING IN THE NEW MEDIA

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The rules pertaining to false or misleading commercial speech apply in the so-called “new media” marketplace just as they do in traditional print or broadcast media. But the Internet has given rise to some new, and troubling, advertising and behavioral-tracking techniques that have become the target of much recent legislation, regulation, and litigation.

### DECEPTION ON THE NET

As noted earlier, the FTC has recently increased its vigilance of the Internet, where consumers have been complaining about new kinds of aggravating deception. For example, the FTC charged that a man registered hundreds of Internet domain names that were misspellings of legitimate, popular domain names and then diverted web surfers from their intended destinations to one of his sites. Once there, he held consumers captive and pelted their screens with a barrage of adult-oriented ads. The FTC alleged, for instance, that the defendant registered forty-one variations on the name of recording star Britney Spears. Once a user entered one of the defendant’s sites, the defendant used a “mousetrapping” technique to make it difficult to exit. Clicks on the Close or Back buttons caused new ad windows to open. In this case, the FTC obtained a permanent injunction in 2002 against the deceptive redirection and obstruction practices and a federal court order that the defendant give up nearly \$2 million in ill-gotten gains.<sup>60</sup>

In 2002 the FTC also filed a complaint in federal District Court against an organization that sent spam e-mail messages claiming that consumers had won a free Sony PlayStation or other prize, purportedly sponsored by Yahoo, Inc. When consumers responded to the e-mail, they were sent to an imitation Yahoo page and instructed to download a program that would supposedly allow them to connect toll-free to a website where they could claim their prize. But instead they were routed via a 900-number modem connection that charged them up to \$3.99 a minute, according to the FTC complaint. The District Court issued a temporary restraining order in the case, prohibiting the alleged misrepresentations, and froze the defendant’s assets pending final adjudication.<sup>61</sup>

Following are some of the key areas of concern in new-media marketing and advertising campaigns:

## SPAMMING

Mass distribution of unsolicited, commercial e-mail messages—or “spamming”—is a major headache for consumers and Internet service providers. According to some estimates, more than 80 percent of all e-mail traffic consists of unsolicited promotions for products or services. Service providers such as AOL have the right to manage or reduce the level of spam on their systems, through a variety of legal or technical means. And consumers have some self-help avenues to avoid appearing on commercial e-mail lists, to remove themselves from such lists, or to block commercial messages with filtering software.

But some spammers use devious means to get their messages through and avoid reprisal. Therefore, about 40 states have some form of anti-spam law on the books. Most target fraudulent or misleading commercial e-mail. A few aim more broadly at virtually any form of unsolicited bulk e-mail. The status of some of these laws is uncertain, however. Some are likely preempted in whole or in part by the federal anti-spam law. And some are likely overly broad infringements on free expression.

In 2008 Virginia’s Supreme Court held that the state’s anti-spam law unconstitutional. The case arose when police arrested a man who sent tens of thousands of commercial e-mails with falsified routing and transmission information to America Online subscribers. He was charged with violating the Virginia criminal statute that prohibited using a computer network with intent to falsify any e-mail transmission information. Following a jury conviction the defendant was sentenced to nine years in prison. But Virginia’s high court reversed the conviction, holding that the anti-spam statute was unconstitutionally overbroad. The law wasn’t limited to misleading commercial e-mails. Rather, it also could target any bulk e-mail containing anonymous political messages—a form of protected speech.<sup>62</sup>

Congress passed its own anti-spam law, the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act, which became effective in 2004.<sup>63</sup> It does not ban spam. But it prohibits spammers from sending misleading information or using deceptive subject headers, requires them to include a functional return address in their e-mails, and prohibits them from sending additional e-mails to any recipient who has indicated he or she doesn’t want further messages from the spammer. The federal CAN-SPAM Act expressly preempts state spam control laws—other than those that confine themselves to prohibiting falsity or deception in commercial e-mails. The FTC as well as the various state attorneys general have authority to enforce the CAN-SPAM Act.

## TRAFFIC DIVERSION

The web has proven to be an exciting medium for advertisers, allowing them to target and captivate potential customers in new and creative ways. Yet it also offers unique ways to undermine competitors. In particular, keywords, banner ads, and pop-up ads have been used to divert website traffic away from better-known companies and brands.

A keyword is any term used in a search engine query. Many search engines will sell the right to have a banner ad displayed whenever a particular keyword is entered by a consumer. This can be a significant source of revenue for search engines. But the problem is that some search services will sell advertising rights linked to keywords that are also trademarks. This may allow one company to steer traffic away from a search that was clearly intended to reach a competitor. Similarly, pop-up ads may be designed to appear, in an overlapping window, when a computer user attempts to enter another company's website. These advertising practices have begun to generate significant litigation. But the practices are not considered *per se* deceptive, nor are there specific laws to prohibit such advertising. Rather, most of the disputes are being analyzed according to traditional principles of trademark infringement or unfair competition (see Chapter 8), on a case-by-case basis.

In *Playboy Enterprises v. Netscape*,<sup>64</sup> for example, Playboy alleged trademark violations against Excite and other Internet defendants. Excite had included two of the plaintiff's trademarks—"Playboy" and "Playmate"—in a list of keywords sold to advertisers of hard-core adult material. In the closely watched case, the Ninth Circuit Court of Appeals agreed with Playboy in 2004 that there were sufficient issues relating to consumer confusion and trademark dilution to warrant a trial.

## NET NEUTRALITY

Internet service providers have in recent years experimented with setting different levels of service (such as levels of data speeds and costs) that might be triggered by different content. This alarmed content providers and some consumers, who envisioned a day when the character of Internet search results and services might be determined by how much money content providers paid to the online service providers. The concept of "network neutrality" is that Internet service providers will treat all content providers by equal rules and will not discriminate among content providers based on favor with the ISP. The service providers, on the other hand, tend to believe in the freedom to experiment with their business models.

A handful of net neutrality bills were introduced in Congress in 2007 and 2008 but were not enacted. These included, for example, the Internet Freedom Preservation Act that would direct the FCC to study the level of fair competition and consumer protection in broadband Internet services, and the Internet

Freedom and Nondiscrimination Act that would mandate net neutrality as a matter of fair competition under antitrust law.

## CONSUMER PRIVACY

Today's new-media environment provides marketing and advertising professionals with powerful new tools to track individual consumers' online behavior, compile valuable databases of consumer names and contact information, and deliver targeted messages directly into consumers' personal channels of communication. These very activities have caused consumers to fear for their privacy. Congress and the states have reacted by enacting numerous privacy-protecting statutes and regulations. This is a fast-evolving area of law. These are a few of the most important considerations for today's new-media advertiser:

**Telemarketing calls.** The Telephone Consumer Protection Act (TCPA) limits unsolicited marketing calls to home or personal wireless phone numbers.<sup>65</sup> The statute describes circumstances under which commercial solicitations may or may not be made, and it requires that soliciting entities keep and honor a list of consumers who request they not be called back. Further, the FTC and FCC in 2003 established a national Do-Not-Call registry. Telemarketers may not call numbers on the list without express permission or a prior, established business relationship with the consumer.

**Text messages.** The CAN-SPAM Act and accompanying FCC rules make it unlawful to send unsolicited commercial e-mail messages to wireless devices, including cell phones, without the consumer's "express prior authorization." This ban covers only messages that use an Internet address with a domain name. It does not cover messages sent in SMS (short message service) format, which is the format typically used when messages are sent from one mobile phone to another without using an Internet address. Even in SMS format, however, any ongoing messages should be based on express consent, and any commercial call to action must disclose all material terms (such as "standard rates apply") to comply with FTC standards against misleading advertising.

**Personal information collection.** The Children's Online Privacy Protection Act (COPPA), first mentioned in Chapter 5, and the FTC's accompanying regulations significantly limit online collection and disclosure of personal information from children under 13.<sup>66</sup> Under the regulations it is unlawful for an online service or website to collect personal information from a child unless (1) the site gives specific notice of what information will be collected and how it will be used and (2) verifiable parental consent is obtained in advance. Further, parents must be provided a reasonable means to review the personal information collected, whether collected directly or by devices such as "cookies." Unless these rules are followed, even the collection of a child's online photograph, for purposes of an online contest, might violate the law.

Any commercial online activity aimed at children therefore should be designed with the assistance of legal counsel.

In addition to such legal considerations as the above, several trade organizations and initiatives play an active role in self-regulation of online marketing industries and in the publication of model guidelines and best practices. Among these are the Network Advertising Initiative (NAI), the Interactive Advertising Bureau (IAB), the Children's Advertising Review Unit of the National Advertising Review Council (CARU), the Mobile Marketing Association, and the Word of Mouth Marketing Association (WOMMA).

## LIABILITY FOR ILLEGAL ADS

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Under general legal principles of civil and criminal liability, a defendant usually cannot be held legally responsible unless at fault. In other words, some degree of error on the defendant's part, be it negligence, recklessness, or an intent to defraud, generally must be found. In deceptive advertising cases—whether based on the Lanham Act, state statutes, or FTC authority—this principle has generally worked to remove the advertising media from the chain of liability. This is because in most cases newspapers, magazines, broadcast stations, and other media are not in a position to check each submitted advertisement for accuracy, nor are the media generally privy to the kind of information that would reasonably cause a submitted ad to be looked upon with suspicion.

In addition to these general principles, some state and federal statutes specifically limit the potential liability of the advertising media. For example, a California statute specifies that false advertising liability does not apply to any medium that “broadcasts or publishes an advertisement in good faith, without knowledge of its false, deceptive, or misleading character.”<sup>67</sup> However, the media could be liable if the media knew of an ad's material falsehoods when the ad was run or if they perhaps contributed to writing or designing the deceptive message.

As a further safeguard, the advertising media and advertising agencies sometimes include in their contracts with advertisers an indemnity clause stating that in the event the medium or ad agency is found liable on the basis of information provided by the advertiser, the advertiser agrees to indemnify the medium or agency for its losses.

## RIGHT TO REFUSE ADVERTISING

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As private businesses, the mass media are generally free to accept or reject advertising—provided that they don't violate antidiscrimination or antimonopoly laws or breach their advertising contracts. This traditional rule has been recognized by the U.S. Supreme Court, which has held that the First Amendment does

not give advertisers a right of access to the media—not even to the government-regulated broadcast media.<sup>68</sup>

Exceptions may occur, however. In 1988 the U.S. Court of Appeals upheld a preliminary injunction requiring a soap opera magazine to publish advertisements for a soap opera newsletter. The magazine, *Soap Opera Digest*, had carried ads for *Soap Opera Now!*, a newsletter, from 1983 to 1987. Then the magazine refused to continue publishing the newsletter's ads. The newsletter sued, alleging that the refusal to run its ads constituted an antitrust violation—in this case, exclusionary conduct by a competitor without a normal business justification. The trial judge found that the defendant magazine commanded 84 percent of the market for soap opera publications and that the antitrust claim therefore raised a legitimate issue for litigation under the Sherman Act, which prohibits monopolistic practices. Because the magazine could be deemed an essential advertising vehicle for the newsletter, the judge ordered that the ads be published, pending the outcome of the trial. The Court of Appeals affirmed in an unpublished opinion.<sup>69</sup> (Sometimes courts withhold their opinions from publication in the official reports when they do not want the opinion to be cited in court as precedent.)

Also, Congress and the Federal Communications Commission do require that under certain circumstances broadcast stations run political ads submitted by individual candidates. These rules were examined in Chapter 10. There are no similar rules for access by commercial advertisers, however.

The issues of access to the media and the media's right to reject advertising often arise in the context of student publications. One such case, discussed in Chapter 2, involved a decision by public high school principals in Las Vegas to prohibit ads for birth control services in campus newspapers. The prohibition was upheld by the U.S. Court of Appeals. When ads are refused by student publications at public schools, the distinction between a public forum publication and a laboratory publication may be important. If, as in the Las Vegas case, the publication is operated as a learning lab and is not a public forum, administrators have great discretion to set reasonable policies and reject particular content, including ads. If the publication is a public forum, administrators lose this control. However, the student editors of the forum papers presumably can freely decide to reject ads.

## Summary Points

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**Commercial speech is accorded a lesser degree** of First Amendment protection than most other kinds of speech. Truthful commercial speech can be regulated if the government has a substantial interest in doing so. And commercial speech is entirely without First Amendment protection if it is false or misleading or if it advertises an illegal product.

**In the *Central Hudson* case, the Supreme Court** articulated a four-part test for resolving constitutional challenges to advertising regulation. The Court's

applications of the test, in cases such as 44 *Liquormart* in 1996, demonstrate that government must have very sound reasons, coupled with a sharply tailored law, if it intends to keep truthful commercial information from the public.

**As an alternative to banning truthful ads** for disfavored products, regulators have been more inclined to require that the ads contain warning messages. Disclosure statements have also been mandated for other kinds of commercial advertising. These required disclosures have not been held to violate advertisers' First Amendment rights.

**False or deceptive commercial speech** is subject to attack from many directions, including the Federal Trade Commission, state attorneys general, local prosecutors, competitors, and consumers. Historically, it was the FTC that advertisers most had to fear, and commission rulings over the years have provided much guidance for advertisers and the states on how commercial messages should be interpreted.

**The federal Lanham Act has been used frequently** in recent years by businesses that wish to halt what they see as misleading advertising by their competitors. The Lanham Act was designed to protect the integrity of the commercial marketplace.

**State statutes against false and misleading advertising** often authorize lawsuits directly by consumers who believe they have been misled by an advertiser. State law enforcement authorities have also banded together in some cases, using their various state statutes collectively to combat the practices of major national or regional advertisers.

**One of the problems presented in the chapter Hypothetical** was a proposed ban on fast-food advertising. Despite much concern in recent years about poor childhood nutrition, such a ban would have difficulty passing the *Central Hudson* test. Surely a substantial interest—public health—might be at stake. But it would be tough to prove that the ad ban directly advances that interest and that the restriction is no more extensive than necessary. The chapter Hypothetical presents many other potential problems relating to testimonials by the bowler and the blogger, collection of personal information from children, unsolicited messages to cell phones, and legal issues discussed in earlier chapters, such as copy-right infringement and the right of publicity.

## Discussion Questions

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1. In light of the decision in *Bates v. State Bar of Arizona* and the development of the *Central Hudson* test, do you think advertising bans on any of the professions could be constitutionally valid? Could physicians be prevented from truthfully advertising their services and fees in TV commercials or on billboards? Might any substantial justifications exist for such a ban?



2. Based on the principles discussed in this chapter, is there any limit on the government's ability to require warning messages in product advertising? For example, suppose Congress enacted a law stating that all advertising for high-calorie fast food must contain a boldface message citing various health statistics and warning consumers about dangers of eating fast food too frequently. Further suppose that the law requires the warning message to be enclosed in a box equal to one-third of the total space purchased for the ad. Should this be considered a substantial restriction on advertising, thereby invoking the *Central Hudson* test? At what point does a warning notice requirement work as a de facto ban on advertising?
3. Do you think the definition for misleading advertising should encompass ads that are *likely* to mislead reasonable consumers, as the current FTC standard reads, or should plaintiffs and prosecutors have to prove that an ad actually *did* mislead reasonable consumers? Some members of the advertising industry have argued in favor of the latter standard. Or do you think the standard should move in the other direction, prohibiting advertising that could result in *possible* deception? This was the standard used in the 1970s.
4. A common advertising technique is to link a particular product with some other gratifications. For many years Marlboro cigarettes have been linked to the serenity and ruggedness of wide open pastures, for example, and a TV advertising campaign linked Old Milwaukee beer to parties with the "Swedish Bikini Team." Legally speaking, why don't such ads qualify as deceptive messages?

## Key Terms

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cease-and-desist order  
 class action  
 consent order  
 corrective advertising  
 deceptive advertising  
 endorsement

industry guides  
 material representation  
 prior substantiation doctrine  
 puffery  
 trade regulation rules

# Glossary of Legal Terms

<b>Absolutist</b>	The view that First Amendment freedoms should be absolute, that the amendment should be interpreted literally to protect expression against any government regulation.
<b>Abuse of process</b>	A tort committed by the misuse of legal proceedings; employment of litigation procedures, such as seeking an injunction, for ulterior purposes.
<b>Acquittal</b>	A verdict after a criminal trial that the defendant has not been proven guilty beyond a reasonable doubt.
<b>Action</b>	A lawsuit.
<b>Actual damages</b>	Compensatory damages based on evidence of actual harm to the plaintiff, as opposed to presumed damages.
<b>Actual malice</b>	Publishing with knowledge of falsity or with reckless disregard for the truth. The constitutional standard of fault that a public figure plaintiff must prove to win a libel case against the media.
<b>Administrative regulations</b>	Laws enacted by administrative agencies, such as the FCC.
<b>Affirm</b>	To uphold the decision of a lower court.
<b>All-purpose public figure</b>	A person who has achieved widespread notoriety and who, as a defamation plaintiff, will always have to show actual malice by the defendant.
<b>Answer</b>	The defendant's formal response to a plaintiff's allegations as stated in a civil complaint.
<b>Anti-SLAPP statute</b>	State laws that provide a streamlined method for dismissing libel lawsuits that are filed in an attempt to subdue legitimate comment on public issues.
<b>Appellant</b>	The party who appeals a court judgment to a higher court; sometimes called the petitioner.
<b>Appellate court</b>	A court with jurisdiction to hear appeals and review the rulings of trial courts.
<b>Appellee</b>	The party against whom an appeal is taken; sometimes called the respondent.
<b>Appropriation</b>	The commercial use of a person's name or likeness without consent. One of the commonly recognized forms of invasion of privacy; sometimes called misappropriation.
<b>Arraignment</b>	A criminal proceeding in which an accused is brought before the court to hear the charge against him or her and to enter a plea of guilty or not guilty.
<b>Ascertainment</b>	A study of the needs and issues of a community, formerly required of applicants for FCC broadcast licenses.
<b>Band allotment</b>	The governmental task of determining how many broadcast channels will be made available within each designated segment of the radio spectrum.
<b>Bench/bar/media committees</b>	Community groups consisting of judges, lawyers, and newspeople who are organized to discuss points of friction between the media and the justice system and, ideally, build cooperation.

<b>Bench trial</b>	A trial in which all factual and legal determinations are made by a judge, without the presence of a jury.
<b>Bill of Rights</b>	The first ten amendments to the U.S. Constitution, ratified by the states in 1791.
<b>Blanket License</b>	A copyright license that allows the user, such as a radio or TV station, to perform or broadcast all protected works in the copyright holder's repertory, rather than having to negotiate permission on a work-by-work basis. Agreements with the music-rights organizations ASCAP and BMI typically are blanket licenses.
<b>Breach of contract</b>	A legally inexcusable failure to perform as obligated under a contract.
<b>Brief</b>	A persuasive document prepared by the lawyer arguing a case in court. It sets forth the factual and legal arguments being made on the client's behalf.
<b>Broadcasting</b>	The transmission of radio or television signals, via the public airwaves, for intended reception by a mass audience.
<b>Case law</b>	Law derived from the previous, published decisions of appellate courts.
<b>Cause of action</b>	Particular facts entitling a person to a claim for legal redress. For example, a sloppy news story could provide a cause of action for libel and a cause of action for invasion of privacy.
<b>Cease-and-desist order</b>	An order from an administrative agency prohibiting a person or business from continuing specified conduct.
<b>Certiorari</b>	A discretionary order commonly used by the U.S. Supreme Court to indicate that the Court has agreed to review a case. This action by the Court is referred to as granting cert.
<b>Change of venue</b>	Moving a trial to another location, often to avoid the effects of extensive media publicity.
<b>Channel assignment</b>	The governmental process of awarding the use of a particular broadcast frequency to a particular applicant.
<b>Civil law</b>	The law pertaining to noncriminal matters in which one person or business sues another to obtain some legal relief.
<b>Class action</b>	A lawsuit instituted by one party or a small group, not only in their own interest, but also on behalf of many other parties with the same grievance.
<b>Clear and present danger</b>	A standard adopted by the U.S. Supreme Court to determine when government may forbid speech encouraging violence or civil unrest.
<b>Codes</b>	Systematic compilations of laws, such as the statutes or administrative regulations of a state.
<b>Collaboration agreement</b>	A contract between the joint authors of a copyrightable work.
<b>Collective work</b>	A copyrightable compilation of individual works of authorship that are themselves also protected by copyright, such as an anthology of stories by various writers.
<b>Commercial use (of name or likeness)</b>	Use of another person's identity for trade or self-enrichment purposes.
<b>Common law</b>	Legal rules and principles that originate solely from judicial decisions, as distinguished from the laws enacted by legislatures.
<b>Comparative proceeding</b>	An FCC administrative hearing formerly used to determine who should receive a broadcast license among two or more competing applicants; also known as a comparative license hearing.
<b>Compelled speech</b>	Expression that government requires a person or group to utter or to carry in its medium.
<b>Compelling interest</b>	A rigorous standard that government must meet to justify restrictions on First Amendment freedoms; justification of the highest order.

<b>Compensatory damages</b>	Monetary compensation awarded in court for a particular loss or injury. Distinguished from punitive damages or nominal damages.
<b>Compilation</b>	A copyrightable work formed by the creative assembly of preexisting works or information.
<b>Complaint</b>	A legal document that begins a lawsuit by stating the plaintiff's grievance and the remedy being sought; the initial pleading filed in a civil case.
<b>Compulsory licensing</b>	A system allowing copyrighted works to be used without negotiation or consent in exchange for mandatory payment of a set license fee.
<b>Concurring opinion</b>	An appellate court opinion in which one or more judges agree with the majority ruling but state different or additional reasons.
<b>Consent order</b>	A formal agreement by a defendant to cease activity that the government alleges to be illegal, such as deceptive advertising as alleged by the FTC.
<b>Constitution</b>	The fundamental law of a nation or state, typically establishing the government's basic organization and describing the extent and limits of its sovereign powers.
<b>Constitutional law</b>	Law concerning the basic organization and powers of government and the individual liberties enumerated in constitutions.
<b>Constitutional malice</b>	Disseminating information knowing it to be false or with reckless disregard to its veracity. Another term for <i>actual malice</i> , the high degree of fault that must be proved against defendants in many libel cases.
<b>Contempt of court</b>	Willful disobedience to a judicial order, punishable by a fine or time in jail.
<b>Content-neutral restriction</b>	Government action that restrains expression in a particular place or medium but is <i>not</i> based on the content of the message.
<b>Continuance</b>	A court order postponing a trial or other proceeding to a later time or day.
<b>Contract</b>	A legally enforceable agreement made either orally or in writing.
<b>Copyright</b>	An intangible property right granted by federal statute to the authors of literary, musical, and pictorial works.
<b>Core children's programming</b>	Television programming specifically designed to serve the educational needs of an audience aged 16 or younger and that satisfies requirements of the Children's Television Act of 1990.
<b>Corrective advertising</b>	Government-ordered disclosures that a person or organization must make to compensate for prior deceptive advertising. An enforcement tool occasionally used by the FTC.
<b>Court reports</b>	Volumes containing the judicial opinions of a particular court or jurisdiction.
<b>Courts of equity</b>	Historically, courts that operated by a distinctive set of rules and offered alternative remedies to the usual money damages. The most common equitable remedy is an injunction.
<b>Criminal law</b>	The state and federal statutes that define criminal offenses and punishment. Criminal cases are brought to trial, or prosecuted, by government lawyers.
<b>Criminal trespass</b>	Wrongly entering or remaining upon another's property in blatant defiance of the owner's clearly stated wishes.
<b>Custom and usage</b>	Any practice sufficiently common and accepted in society that the law assumes tacit consent to that practice. An example is approaching the front doors of homes to make a sales pitch.
<b>Damages</b>	Money awarded in court to a person unlawfully harmed by another. Damages are compensatory, if awarded as the measure of injury suffered, or punitive, if awarded in addition as punishment for outrageous conduct by the offending party.
<b>Deceptive advertising</b>	Advertising deemed illegal under state or federal statutes because of its capacity to mislead reasonable consumers.

<b>Defamation</b>	Communication that unjustly harms the reputation of another person. Includes the torts of libel and slander.
<b>Defendant</b>	In a civil case, the person or business being sued. In a criminal case, the person being prosecuted.
<b>Demurrer</b>	A motion to dismiss a civil case, alleging that the plaintiff's complaint fails to state grounds for a valid legal claim.
<b>Derivative work</b>	A copyrightable production formed by creatively altering or adapting a preexisting work.
<b>Dictum</b>	A superfluous comment in a judicial opinion; a statement that is not necessary to the court's decision and therefore does not carry the force of precedent.
<b>Dilution</b>	Any activity that tends to weaken the distinctive quality of another's trademark.
<b>Discovery</b>	The ascertainment of relevant facts, prior to trial, by the parties to a lawsuit. Formal discovery tools used by lawyers include oral depositions, requests to produce documents, and mental examinations.
<b>Dissenting opinion</b>	An appellate court opinion by one or more judges explaining their disagreement with the decision of the majority.
<b>Diversity action</b>	A lawsuit that comes within the jurisdiction of the federal courts because the parties are citizens of different states.
<b>Diversity of citizenship</b>	A type of federal court litigation in which the opposing parties are citizens of different states.
<b>Doctrine of incorporation</b>	A judicial principle under which the fundamental liberties in the Bill of Rights, including the right to free speech, are protected against impairment by the states as well as by the federal government. The due process clause of the Fourteenth Amendment, which is aimed at the states, has been construed to incorporate those fundamental liberties articulated nearly a century earlier.
<b>Doctrine of judicial review</b>	Principle that the courts have authority to review and declare unconstitutional the actions of other branches of government.
<b>Doctrine of overbreadth</b>	A tenet of constitutional law stating that any prohibition aimed at unprotected expression shall be invalid if it would also tend to suppress untargeted, protected speech.
<b>Doctrine of precedent</b>	A basic rule of the U.S. judicial system that earlier decisions of a court shall serve as guiding authority to be followed when the court again faces an identical or similar issue.
<b>Due care</b>	The degree of care that an ordinarily prudent person would have exercised under the same circumstances.
<b>Due process clause</b>	Language found in the Fifth Amendment of the U.S. Constitution, pertaining to the federal government, and also in the Fourteenth Amendment, pertaining to state government. Under the concept of due process, a person is guaranteed fair governmental procedures.
<b>Electronic Communications Privacy Act</b>	Federal legislation passed in 1986 that makes it a crime to use devices to intercept or record others' communications.
<b>Endorsement</b>	A message of product or service approval that is represented to come from a party other than the sponsoring advertiser.
<b>Equal Employment Opportunity (EEO) rules</b>	Rules enacted by the FCC requiring that broadcast licensees follow specific steps to ensure equal employment opportunity at their broadcast stations.
<b>Equal opportunities rule</b>	Federal statute requiring that whenever one candidate for public office "uses" broadcast time, the station must allow equal opportunity to all other candidates in the race. Also called the equal time rule.

<b>Equal protection clause</b>	A provision in the Fourteenth Amendment of the Constitution that requires states to treat similarly situated persons in an equal fashion.
<b>Espionage Act</b>	A World War I–era federal act that made it a crime to willfully attempt to cause disloyalty in the military or to hamper military recruiting, among other things.
<b>Executive privilege</b>	A privilege that exempts presidential documents from disclosure requirements.
<b>Executive session</b>	A governmental meeting, or portion of a meeting, that is closed to the public.
<b>Express consent</b>	Definite and specific assent to a course of action, as distinguished from implied consent.
<b>Expressive conduct</b>	A hybrid form of expression in which conduct, such as burning a flag, is performed in a manner intended to convey a particular message. Also called symbolic speech.
<b>Fair comment privilege</b>	A common law defense to libel; a privilege to make statements of honest opinion on matters of public interest.
<b>Fair report privilege</b>	A defense against libel claims, applied to fair and accurate reports of public proceedings. Also known as the public record privilege.
<b>Fair use doctrine</b>	A privilege to use copyrighted material for limited, productive purposes without the owner's consent.
<b>Fairness doctrine</b>	An FCC rule that required, among other things, that broadcasters provide contrasting viewpoints on public issues. The main provisions of the doctrine were abandoned by the FCC in 1987.
<b>False light</b>	A tortious representation of an individual in a false and highly offensive manner before the public. Recognized in many states as a form of invasion of privacy.
<b>FCC</b>	Federal Communications Commission. A federal agency, headed by five appointed commissioners, that enacts and administers laws pertaining to broadcasting and other electronic communications.
<b>Federal circuits</b>	Judicial divisions for the U.S. Courts of Appeal; includes eleven multistate circuits, one for the District of Columbia, and one with nationwide jurisdiction to hear appeals in certain specialized kinds of cases.
<b>Fraud</b>	A misrepresentation intended to deceive another person and thereby gain some advantage, often in the process of making a contract.
<b>Freedom of Information Act (FOIA)</b>	An act of Congress requiring that most documents of federal agencies be open to public inspection.
<b>FTC</b>	Federal Trade Commission. A federal agency, headed by five appointed commissioners, that regulates advertising and other business practices.
<b>Gag order</b>	A restrictive court order directing attorneys, witnesses, or other trial participants not to discuss the case with the media. Sometimes a gag order is aimed at the media, directing them not to report on legal proceedings until their conclusion.
<b>Generic term</b>	A term used in common discourse to refer to a general class of products or services rather than to a specific product or manufacturer.
<b>Grand jury</b>	A body of citizens whose duty is to determine whether probable cause exists to formally charge someone with a crime.
<b>Harassment</b>	A crime or tort committed when one person follows, stalks, or interrupts another in a highly annoying or threatening manner.
<b>Holding</b>	The central legal principle to be drawn from a court decision.
<b>Impartial jury</b>	A jury that begins trial in an open-minded, unprejudiced frame of mind. A provision of the Sixth Amendment.

<b>Implied consent</b>	Consent reasonably assumed from signs, actions, silence, or tradition.
<b>Incitement standard</b>	A stricter version of the clear-and-present danger test, adopted by the U.S. Supreme Court to determine when speech is sufficiently dangerous that it may be punished.
<b>Indecency</b>	A category of sexually explicit material, broader than obscenity, that is prohibited in the broadcast media during times when children are likely to be in the audience.
<b>Indictment</b>	The formal accusation issued by a grand jury against a person charged with a crime.
<b>Industry guides</b>	Detailed descriptions of what the FTC considers to be illegal advertising practices, published by the FTC to put advertisers on notice.
<b>Initial appearance</b>	In federal criminal cases, the defendant's first formal appearance in court, when the specific charges are read and a plea may be entered.
<b>Injunction</b>	A court order that a defendant act, or refrain from acting, in a particular manner.
<b>Intellectual property</b>	Products of the mind, including copyrights, trademarks, and patents, that have legal status apart from any physical property in which they may be embodied.
<b>Intentional infliction of emotional distress</b>	A tort committed by outrageous conduct intended to cause severe emotional injury to another.
<b>Intermediate scrutiny</b>	A relaxed judicial test, applied to restrictions on certain kinds of speech, to determine if the restrictions are constitutional. The test applied to content-neutral time/place/manner restrictions, for example.
<b>Intrusion</b>	A tort consisting of a highly offensive invasion of a person's physical seclusion or private affairs. One of the legally recognized forms of invasion of privacy.
<b>Joint work</b>	A work in which two or more co-creators share the copyright.
<b>Jurisdiction</b>	Authority of government and its courts to make and enforce laws and to decide cases. Limited by territorial and subject matter boundaries.
<b>Jury admonitions</b>	A judge's orders or warnings to the jury concerning its duty to consider only the admissible evidence.
<b>Justiciable controversy</b>	A specific legal dispute between people or entities whose legal rights are in jeopardy, as opposed to a controversy that is hypothetical, academic, or moot.
<b>Knowing consent</b>	Consent granted with actual knowledge of its significance; legally valid consent.
<b>Law of equity</b>	Historically, a separate system of law developed in England for the purpose of granting remedies other than money damages. An injunction, for example, is referred to as an equitable remedy.
<b>Legal brief</b>	A written statement of the pertinent facts and legal issues, prepared by the counsel arguing a case in court.
<b>Liable</b>	Legally responsible; obliged to pay compensation.
<b>Libel</b>	A false communication that wrongfully injures the reputation of another. In many jurisdictions, <i>libel</i> refers only to defamation that occurs in writing; oral defamation is called slander.
<b>Libel by implication</b>	Defamation based on a logical inference from words, pictures, or gestures rather than on a direct statement.
<b>Licensing</b>	The sale of rights to use a copyrighted work or other form of creative property.
<b>Limited-purpose public figure</b>	A person who has assumed the public spotlight with respect to one particular issue and who, as a defamation plaintiff, must show actual malice by the defendant only if the alleged libel is related to that issue.
<b>Litigant</b>	A party to a lawsuit; a plaintiff or defendant.

<b>Litigation</b>	A case or lawsuit.
<b>Majority opinion</b>	A written appellate court opinion in which a majority of the court's judges join.
<b>Malicious prosecution</b>	A tort committed by the unjustifiable initiation of criminal or civil proceedings.
<b>Master use license</b>	Authorization to use a particular, copyrighted sound recording in a film or other work.
<b>Material representation</b>	A statement upon which an average consumer or investor might reasonably rely when making a purchasing decision.
<b>Miller test</b>	The current test for determining when sexually explicit material is obscene and unprotected by the First Amendment. Adopted by the U.S. Supreme Court in <i>Miller v. California</i> , 1973.
<b>Misappropriation</b>	The privacy tort of appropriating a person's identity for commercial purpose without consent.
<b>Model release</b>	A written consent form, signed by people who appear in photographs to be used commercially.
<b>Moral rights</b>	A limited form of control that artists retain over their creations, regardless of who purchases the works. Recognized primarily in Europe.
<b>Motion</b>	A formal request that a judge make some kind of ruling in favor of the applicant. Examples: motion for a continuance, motion for summary judgment, motion to suppress evidence.
<b>Motion to suppress</b>	A common motion in criminal cases whereby the defendant requests that certain evidence be ruled inadmissible at trial.
<b>Must-carry law</b>	A federal requirement that cable TV systems carry the signals of any local, over-the-air television stations that request carriage.
<b>Name or likeness</b>	In the tort of appropriation, any mark or symbol of personal identity, such as a photograph, voice, or popular nickname.
<b>Natural law</b>	Those fundamental rights and rules of conduct that some believe are universally inherent in the nature of being human; law prompted by a rational understanding of the true nature and capacity of human beings and not by the conventions or systems peculiar to any one people.
<b>Negligence</b>	Failure to exercise due care; lack of care that a reasonable person would have exercised under the circumstances. A fault standard used in tort law.
<b>Network non-duplication rule</b>	An FCC rule that prohibits cable TV systems from importing network programming from a distant market if a local network affiliate already provides that programming.
<b>Neutral reportage</b>	A libel defense recognized in some jurisdictions; allows a reporter to publish allegations made by one newsworthy person about another, even if the reporter suspects the allegations are untrue.
<b>Newsworthiness defense</b>	A defense to lawsuits for public disclosure of private facts.
<b>Nominal damages</b>	A small sum awarded to a plaintiff based on principle, when there is no actual loss or injury to be compensated.
<b>Obscenity</b>	Hard-core, sexually explicit material that lacks First Amendment protection. Defined by the U.S. Supreme Court in <i>Miller v. California</i> , 1973.
<b>Open meeting laws</b>	Federal and state statutes that grant a public right of access to the meetings of deliberative governmental bodies, usually in the legislative and executive branches.
<b>Open records laws</b>	Statutes that grant citizens a right of access to government documents and specify the procedures for requesting that access. The federal model is the Freedom of Information Act.
<b>Opinion</b>	A written explanation that accompanies the judgment of an appellate court. The majority or plurality opinion expresses the court's decision and may be accompanied by concurring and dissenting opinions. A per curiam opinion is an unsigned opinion representing the whole court.



<b>Ordinances</b>	Laws adopted by cities, counties, and other units of local government.
<b>Outrage</b>	An independent tort composed of intentional, outrageous conduct that causes severe emotional distress. May be called intentional infliction of emotional distress or another name, depending on jurisdiction.
<b>Overbreadth doctrine</b>	See <b>Doctrine of overbreadth</b> .
<b>Paparazzi</b>	Freelance photographers who make their living by aggressively pursuing celebrities to obtain candid pictures.
<b>Parallel citations</b>	An expanded form of reference to a legal case showing where the case can be found in two or more different reports.
<b>Patent offensiveness</b>	In obscenity law, hard-core sexual content that clearly exceeds all boundaries of decency; content commonly described as shocking or sickening to a community at large.
<b>PEG channels</b>	Cable television channels reserved for public access, educational, and government use.
<b>Per curiam</b>	An opinion “by the court”; an unsigned appellate opinion that represents the court as a whole, as distinguished from an opinion signed by a particular judge.
<b>Performance license</b>	A contractual right to publicly perform a copyrighted work. Copyright owners of musical compositions typically authorize a clearinghouse, such as ASCAP or BMI, to license performance rights in their works.
<b>Personal attack rule</b>	An FCC rule requiring broadcast licensees to offer reply time to persons who suffer character attacks during broadcast discussions on public issues.
<b>Personal jurisdiction</b>	A court’s power to bring a particular person or company into its adjudicative proceedings.
<b>Photo consent form</b>	A form commonly used by photographers to get their subjects’ permission to use the pictures for commercial purposes.
<b>Plaintiff</b>	The party who initiates a civil lawsuit, seeking some form of relief or compensation for an injury to rights.
<b>Pleadings</b>	Court documents that contain the parties’ formal allegations of their respective claims or defenses. Examples include the plaintiff’s complaint and the defendant’s answer.
<b>Plurality opinion</b>	In the appellate judicial process, an opinion expressing the viewpoint of more justices than any other opinion, but less than a majority.
<b>Political action committees (PACs)</b>	Groups that make political expenditures and contributions, as allowed by law, using funds derived from voluntary donations. Formally known as <i>separate segregated funds</i> .
<b>Political editorial rule</b>	An FCC rule requiring that when a broadcast licensee airs an editorial opposing a candidate for public office, the candidate must be offered air time to respond.
<b>Pornography</b>	A broad term that may refer to any sexually explicit material, including obscenity.
<b>Precedent</b>	A previously decided case that guides judges in future cases presenting the same issue of law.
<b>Preferred position balancing</b>	An approach to judicial review of speech restrictions in which the free speech interests begin with a heavy presumption of First Amendment protection, and the government must demonstrate sufficient justifications to overcome that presumption.
<b>Preliminary hearing</b>	In criminal cases, a hearing to determine whether the government has enough evidence against the accused to warrant a full-blown trial.
<b>Press pass</b>	A media identification card issued by many government agencies and private organizations that grants special rights of access to newsmen.
<b>Presumed damages</b>	In defamation cases, compensation awarded to a plaintiff based on a jury’s logical presumption of what the extent of harm will be.

<b>Prior restraint</b>	A government restraint on expression that is imposed prior to publication or other dissemination to the public, as distinguished from sanctions imposed following publication.
<b>Prior substantiation doctrine</b>	The FTC requirement that advertisers possess reasonable substantiation for all verifiable product claims before the claims are made.
<b>Private facts</b>	Information about an individual that is not available to the public and is of a nature that people generally keep confidential. A key element to a lawsuit for wrongful disclosure of private facts.
<b>Product disparagement</b>	The intentional and false disparagement of another's goods, causing economic harm; trade libel.
<b>Program-length commercial</b>	A television program associated with a particular product, in which commercials for that product are aired. Under FCC policy, the entire program counts as commercial time.
<b>Prurient interest</b>	An element of obscenity, referring to lewd or morbid thoughts about sex, as opposed to normal sexual desires.
<b>Public domain</b>	In copyright law, a term applied to works that no longer have copyright protection and therefore may be used by the public without consent.
<b>Public figure</b>	In defamation law, a plaintiff who occupies a prominent role in public events, usually voluntarily, and who should reasonably expect public scrutiny.
<b>Public forum</b>	A government-provided place or medium that is specifically designed or traditionally used for free speech by the public.
<b>Public inspection file</b>	A file that every broadcast station is required to keep, for viewing by the public upon request. It contains such items as ownership reports, program lists, and a copy of the station's license renewal application.
<b>Public official</b>	In defamation law, a plaintiff who is a government employee in a position of substantial responsibility or control.
<b>Public record privilege</b>	The right to accurately disseminate information that appeared in an open governmental proceeding or in public documents, without incurring liability for defamation or for publication of private facts.
<b>Publication</b>	In defamation law, the act of disseminating the harmful expression to at least one other "third party."
<b>Puffery</b>	Exaggerated, figurative advertising claims that consumers would not assume to be grounded in factual documentation.
<b>Punitive damages</b>	A monetary sum awarded to a plaintiff, over and above the amount needed to compensate for property loss or injury. Punitive damages, also called exemplary damages, are awarded to punish a defendant for malicious conduct.
<b>Radio spectrum</b>	The range of naturally occurring electromagnetic waves that can be used for broadcasting.
<b>Rational basis standard</b>	A minimum level of judicial scrutiny that all laws must be able to satisfy. In order to be constitutional, all laws must have some apparent, rational justification.
<b>Reasonable care</b>	A standard of care that all people are legally obliged to exercise whenever there exists a foreseeable risk of injury to others; due care. Failure to exercise this minimum level of care constitutes negligence.
<b>Remand</b>	To send a case from the appellate court back down to the trial court where it was originally heard.
<b>Renewal expectancy</b>	Historically, the preference generally given to current broadcast licensees at license renewal time against a newcomer trying to wrest the frequency away.
<b>Respondent</b>	The party against whom an appeal is made; also called the appellee.
<b>Restraining order</b>	An interim court order forbidding the defendant from engaging in allegedly harmful behavior. Typically it is effective until a full proceeding can be conducted on the plaintiff's application for a permanent injunction.

<b>Retraction statutes</b>	Laws in about thirty states that encourage potential libel plaintiffs to request, and the media to run, timely retractions of defamatory reports.
<b>Retransmission consent</b>	A legal option that allows a TV broadcast station to keep its signal off a local cable system unless the broadcaster and cable system agree upon compensation.
<b>Reverse</b>	To overturn the judgment of a lower court.
<b>Rhetorical hyperbole</b>	Emotional, exaggerated name-calling that an audience would not take as fact and therefore is not defamatory.
<b>Right of publicity</b>	The legal right of individuals to control and profit from the commercial use of their own identities. See <b>Appropriation</b> .
<b>Rule 10b-5</b>	A regulation of the Securities and Exchange Commission that requires corporations to disseminate their financial news promptly and accurately.
<b>Rulemaking</b>	The process by which administrative agencies, such as the FCC, adopt legally enforceable regulations.
<b>Safe harbor</b>	The hours of the day during which broadcasters may legally air material that is indecent and inappropriate for children.
<b>Scarcity rationale</b>	The primary legal justification for broadcast regulation, based on the fact that the radio spectrum is limited and cannot accommodate all who might wish to be broadcasters.
<b>Scienter</b>	Guilty knowledge. A degree of knowledge about facts that a defendant must have in order to be charged with a criminal or civil offense.
<b>Secondary meaning</b>	An additional, product-distinctive meaning that a common term may acquire over time when used in commerce. In order to qualify as a protected trademark, common descriptive words or personal names must have acquired a secondary, product-identifying meaning in the minds of consumers.
<b>Sedition Act</b>	A law passed by Congress in 1798 making it a crime to publish false and malicious comments intended to stir up contempt for government officials.
<b>Seditious libel</b>	Communication intended to encourage or incite overthrow of the government; historically, a serious crime.
<b>Selective access</b>	With regard to meetings, news conferences, and the like, granting access to some members of the public and media, but not to others similarly situated. May be constitutionally suspect when practiced by government.
<b>Sequestration</b>	Keeping all of the jurors together during the course of a trial, typically by housing them in a hotel, in an effort to prevent the jury from being influenced by out-of-court information.
<b>Service mark</b>	A protected word, phrase, or symbol used to distinguish a particular brand of service in the marketplace.
<b>Settlement</b>	In litigation, a final determination reached by agreement between the parties.
<b>Shield laws</b>	Laws that give journalists special protection against having to provide subpoenaed information to authorities. About half the states have adopted shield laws, usually by statute.
<b>Slander</b>	Defamation communicated orally rather than in writing. See <b>Libel</b> .
<b>Smith Act</b>	A federal statute that punishes the advocacy of overthrowing government by force or violence.
<b>Sound recording</b>	One of the specifically listed work-of-authorship categories for copyright protection. A particular, recorded performance that may have copyright protection entirely separate from the copyright in the underlying musical composition.

<b>Source licensing</b>	The acquisition of music performance rights by the producers of syndicated TV programs that use the music, as opposed to each TV station individually purchasing the music performance licenses to cover programs they air.
<b>Sovereign immunity</b>	The general principle that state and federal governments cannot be sued in the nation's court systems unless such suits are specifically authorized by statute.
<b>Special damages</b>	In libel cases, a type of compensatory damages based solely on evidence of direct, monetary harm.
<b>Spectrum allocation</b>	The governmental task of reserving certain portions of the radio spectrum for particular uses, such as AM radio, VHF television, and satellite communications.
<b>Spyware</b>	Software that tracks a computer user's website visits without the user's knowledge.
<b>Standard of judicial review</b>	The particular test or level of scrutiny that a court applies to a challenged government action or statute, or the test that an appellate court applies when reviewing the decision of a lower court.
<b>Standing</b>	A direct, tangible, legally protectible stake in a legal controversy. It is a basic principle of law that a party must have standing in order to sue.
<b>State action</b>	Government activity that restricts a constitutional freedom, as opposed to restrictions imposed by private individuals or groups.
<b>Statute of limitations</b>	The time within which a lawsuit or a criminal charge must be filed. Statutes of limitations vary among the states and among different kinds of lawsuits or offenses.
<b>Statutes</b>	The laws passed by legislative bodies.
<b>Statutory damages</b>	In copyright infringement cases, monetary award levels that are set by statute, irrespective of the actual amount of harm to the plaintiff.
<b>Statutory law</b>	Law enacted by legislative bodies, including Congress and the state legislatures, as opposed to common law.
<b>Stay</b>	A court order that stops or temporarily suspends a judicial proceeding or the enforcement of a law or judgment.
<b>Strict liability</b>	A rare circumstance in the law when a defendant may be held responsible for certain kinds of injurious conduct without a determination that the defendant was actually negligent or exhibited any other degree of fault.
<b>Strict scrutiny</b>	In constitutional law, the strictest level of judicial review for statutes and other actions of government. Under strict scrutiny, government action that impedes freedom of speech can be valid only if the action is found to serve a compelling public interest.
<b>Subject matter jurisdiction</b>	A court system's power to consider a particular kind of case or type of law.
<b>Subpoena</b>	A command, backed by legal authority, to appear at a designated time and place to give testimony that is deemed relevant to a legal proceeding. A <i>subpoena duces tecum</i> commands a person to turn over stipulated notes, photographs, videotape, or other documentary evidence.
<b>Substantial interest</b>	In First Amendment cases, a level of government justification for restrictions on speech. A substantial interest is less than a compelling justification, but greater than a mere rational justification.
<b>Summary judgment</b>	A common procedure for ending a lawsuit prior to trial. A party to a lawsuit is entitled to summary judgment in his favor if there is no disputable issue of fact and if established legal rules clearly dictate that he would prevail at trial.
<b>Sunshine Act</b>	The federal open meetings law requiring public access to the meetings of about fifty federal agencies, including the Federal Trade Commission and the Federal Communications Commission. See also <b>Freedom of Information Act (FOIA)</b> .

<b>Symbolic speech</b>	A form of expression in which conduct, such as burning a flag, is performed in a manner that conveys a particular message. Also called expressive conduct.
<b>Synchronization license</b>	Authorization to incorporate copyrighted music into a video production.
<b>Syndicated program exclusivity rule (syndex)</b>	An FCC rule by which TV stations possessing exclusive contracts with syndicators may company from importing the same syndicated prohibit any cable program into the community from a distant source.
<b>Time, place, and manner (TPM) restriction</b>	A government limitation on speech that is not based on the content of expression. Such a restriction is more likely to be constitutionally valid than an outright ban or a content-based limitation.
<b>Torts</b>	Wrongful acts, other than breaches of contract, for which the law gives the injured party some legal remedy against the wrongdoer in civil court. Examples include invasion of privacy, trespass, libel, infliction of mental distress, and negligence.
<b>Trade libel</b>	Intentional disparagement of the quality of a product, resulting in monetary loss. Also called product disparagement.
<b>Trade name</b>	A protected word or phrase used to identify and distinguish a company in the marketplace.
<b>Trade regulation rules</b>	Rules adopted by the FTC that specify certain kinds of advertising or packaging practices as automatically deceptive and illegal.
<b>Trademark</b>	A distinctive mark used in commerce to identify and authenticate the goods of a particular manufacturer. Trade names and service marks perform similar functions for business names and their services.
<b>Trespass</b>	An intentional, unconsented entry upon property rightfully controlled by others.
<b>Trial court</b>	A court in which civil cases or criminal proceedings begin; a court authorized to hear evidence and determine the facts when they are in dispute.
<b>Unfair competition</b>	The use of deceptive means to unfairly gain competitive advantage in commerce, considered a tort in many jurisdictions.
<b>U.S. Court of Appeals</b>	The intermediate appellate court in the federal judicial system. The nation is divided into eleven geographic circuits plus the District of Columbia, each with its own Court of Appeals. Cases are typically heard by panels of three judges.
<b>U.S. District Court</b>	In the federal judicial system, a trial court with general jurisdiction. Each state has at least one U.S. District Court.
<b>U.S. Supreme Court</b>	The nation's highest-ranking court; the court of last resort. An appellate court consisting of the chief justice of the United States and eight associate justices.
<b>Venue</b>	The county or district in which a criminal or civil case may properly be filed and adjudicated.
<b>Void-for-vagueness doctrine</b>	A principle of constitutional law stating that any statute aimed at legitimately restricting speech shall nevertheless be invalid if its terms are so vague that untargeted, protected speech may also be suppressed. Closely related to the doctrine of overbreadth.
<b>Voir dire</b>	The questioning of prospective jurors to determine if they should sit on the jury in a particular case.
<b>Work made for hire</b>	In copyright law, a work of authorship created for an employer and owned by the employer from the moment of creation.
<b>Zapple doctrine</b>	An FCC regulation that supplements the equal opportunities rule. It requires that whenever supporters of a political candidate are afforded broadcast time, supporters of opposing candidates must be given equal opportunity.

# Notes

## Chapter 1

1. One of the most important constitutional cases of all time is *Marbury v. Madison*, 2 L.Ed. 60 (1803), in which the U.S. Supreme Court held that laws repugnant to the Constitution are void and that it is the province of the Court to make that determination. 2. 5 U.S.C. §500 et seq. 3. See *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). 4. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). 5. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). 6. See, for example, *Superfos Investments Ltd. v. FirstMiss Fertilizer, Inc.*, 774 F. Supp. 393, 397–98 (E.D. Va. 1991). 7. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997). 8. *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998). 9. *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 169 F. Supp. 2d 1181, 1186–87 (N.D. Cal. 2001). 10. *Dow Jones & Co., Inc. v. Gutnick*, H.C.A. 56 (Austl. Dec. 10, 2002).

## Chapter 2

1. John Milton, *Areopagitica*, in *The Work of John Milton*, ed. William Haller (New York: Columbia University Press, 1931), 346. 2. Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), 9. 3. See Levy's *Emergence*, Chapter 7, for a detailed account of the laws adopted immediately after the American Revolution. 4. See Sir William Blackstone, *Commentaries on the Laws of England* (London, 1765–69), book 4, chap. 11, ed. William Carey Jones (San Francisco: Bancroft-Whitney, 1916), 151–52. 5. Jefferson to Edward Carrington, January 16, 1787, *A Jefferson Profile as Revealed in His Letters*, ed. Saul K. Padover (New York: J. Day Co., 1956), 44–45. 6. Alexander Meiklejohn, *Free Speech and Its Relation to Self Government* (New York: Kennikat Press, 1948), 88–89. 7. Frederick Siebert, *Freedom of the Press in England, 1476–1776* (Urbana: University of Illinois Press, 1952), 7. 8. Richard Morin and Claudia Deane, "Belief Erodes in First Amendment," *The Washington Post*, Sept. 3, 2002, A15. 9. *Barron v. Mayor and City Council of Baltimore*, 7 Pet. 243 (1833). 10. *Gitlow v. New York*, 268 U.S. 652 (1925). 11. *Gitlow*, 666. 12. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991). 13. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). 14. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). 15. *United States v. Eichman*, 496 U.S. 310 (1990). 16. *Near v. Minnesota*, 283 U.S. 697, 718–19 (1931). 17. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). 18. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). 19. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 583 (S.D. Fla. 1990). 20. *Skywalker Records*, 598–99. See also *Playboy Enterprises v. Meese*, 639 F. Supp. 581 (D.D.C. 1986), in which the court held that the government's threat to publish a list of pornography retailers was an unconstitutional attempt to suppress sales of *Playboy* magazine. 21. *Bantam Books*, 67. 22. *Doe v. University of Michigan*, 721 F. Supp. 852, 853 (E.D. Mich. 1989). 23. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). 24. *Simon & Schuster v. Crime Victims Board*, 502 U.S. 105, 115 (1991). 25. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227–29 (1987). 26. *The Commission on Freedom of the Press, A Free and Responsible Press* (Chicago: University of Chicago Press, 1947). 27. John Merrill, *The Imperative of Freedom* (New York: Hastings House, 1974). 28. *Jerome Barron, Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967). 29. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256, 258 (1974). 30. *Red Lion Broadcasting*

Co. v. FCC, 395 U.S. 367 (1969). 31. *Keller v. State Bar of California*, 496 U.S. 1 (1990). 32. *Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998). 33. *Board of Regents of the University of Wisconsin v. Southworth*, 529 U.S. 217 (2000). 34. *McIntyre v. Ohio Elections Commission*, 512 U.S. 334, 357 (1995). 35. *Yes for Life PAC v. Webster*, 74 F. Supp.2d 37 (Maine 1999). See also *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), holding unconstitutional a requirement that petition circulators wear ID badges. 36. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981). 37. See, for example, *Gannett Satellite Information Network, Inc. v. Township of Pennsauken*, 709 F. Supp. 530 (D.N.J. 1989). 38. See, for example, *Sebago Inc. v. Alameda*, 259 Cal. Rptr. 918 (Ct. App. 1989). 39. Meiklejohn, *Free Speech*, 17. 40. Dissent of Justice Douglas in *Dennis v. United States*, 341 U.S. 494, 590 (1951). 41. Dissent of Justice Douglas in *Scales v. United States*, 367 U.S. 203, 270 (1961). 42. *Miller v. California*, 413 U.S. 15, 23 (1973). 43. Zechariah Chafee, *Free Speech in the United States* (Cambridge, Mass.: Harvard University Press, 1941), 31. 44. *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876, 879 (1988). 45. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). 46. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981). 47. *United States v. O'Brien*, 391 U.S. 367 (1968). 48. *Texas v. Johnson*, 414. 49. See *Southeastern Promotions vs. Conrad*, 420 U.S. 546 (1975), where it was unlawful prior restraint to deny auditorium access for the theatrical production *Hair*. 50. See, for example, *Greer v. Spock*, 424 U.S. 828 (1976). 51. *Arkansas Educational TV Commission v. Forbes*, 523 U.S. 666 (1998). 52. See, for example, *Gambino v. Fairfax County School Board*, 564 F.2d 157 (4th Cir. 1977). 53. The substantial disruption standard comes primarily from an often cited Supreme Court decision upholding the right of students to wear black armbands to school: *Tinker v. Des Moines Independent Sch. Dist.*, 393 U.S. 503 (1969). 54. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). 55. See "First National Survey Since *Hazelwood* Says Censorship Now a 'Fact of Life,'" *Student Press Law Center Report*, 11 (fall 1990): 3. 56. *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001). 57. *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005). 58. See Cal. Educ. Code §§ 48907, 48950 and 66301 (Deering 2009). 59. *Morse v. Frederick*, 551 U.S. 393 (2007). 60. *J.S. v. Blue Mountain School District*, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. 2009). 61. *Planned Parenthood of S. Nevada, Inc. v. Clark County School Dist.*, 887 F.2d 935 (9th Cir. 1989). 62. *First National Bank v. Bellotti*, 435 U.S. 765 (1978). 63. 17 C.F.R. § 240.10b-5. 64. *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 845 (2d Cir. 1968). 65. *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir. 1971). 66. 2 U.S.C. § 441b(a). 67. See 11 C.F.R. § 114.3. 68. *Buckley v. Valeo*, 424 U.S. 1 (1976). 69. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658–59 (1990). 70. See *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). 71. The federal regulations pertaining to the detailed operation of PACs are found in Title 11 of the CODE OF FEDERAL REGULATIONS. 72. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978). 73. *Bipartisan Campaign Reform Act*, 2 U.S.C. § 431 et seq. 74. *McConnell v. FEC*, 540 U.S. 93 (2003). 75. *Rust v. Sullivan*, 500 U.S. 173 (1991). 76. *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984). 77. The leading case is *Snepp v. United States*, 444 U.S. 507 (1980).

### Chapter 3

1. *Schenck v. United States*, 249 U.S. 47, 52 (1919). 2. *Whitney v. California*, 274 U.S. 357, 376 (1927). 3. *Yates v. United States*, 354 U.S. 298 (1957). 4. The Smith Act can be found at 18 U.S.C. § 2385. 5. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). 6. *Hess v. Indiana*, 414 U.S. 105 (1973). 7. *New York Times Co. v. United States*, 403 U.S. 713, 720 (1971). 8. *New York Times*, 725. 9. *New York Times*, 742. 10. *New York Times*, 730. 11. *New York Times*, 756. 12. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 996 (W.D. Wis. 1979). 13. *Progressive*, 993. 14. *Flynt v. Weinberger*, 762 F.2d 134 (D.C. Cir. 1985). 15. *Flynt v. Rumsfeld*, 180 F. Supp. 2d 174 (D.C. 2002). 16. Pub. L. No. 107–56, 115 Stat. 272–402 (2001). 17. *Olivia N. v. National Broadcasting Co.*, 178 Cal. Rptr. 888, 891 (Ct. App. 1981). 18. *Olivia N.*, 892. 19. *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982). 20. *Herceg v. Hustler*

Magazine, Inc., 814 F.2d 1017, 1023 (5th Cir. 1987). 21. *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199, 206 (1979). 22. *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002). 23. Facts taken from unbylined news story, "Boy, 10, Accused of Hiding Homemade Bomb at School," *Daily News of Los Angeles*, December 8, 1990, p. N1. 24. *Weirum v. RKO General, Inc.*, 539 P.2d 36, 41 (Cal. 1975). 25. *Walt Disney Productions, Inc. v. Shannon*, 276 S.E.2d 580, 585 (Ga. 1981). 26. *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 190 (Ct. App. 1988). 27. *Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991). See also *Vance v. Judas Priest*, in which it was alleged that a suicide and an attempted suicide were the result of subliminal messages hidden in the record album *Stained Glass*. A Nevada trial court ultimately ruled in favor of the musical group in 1990. But earlier in the proceedings, it was held that if there were subliminal messages, they would not be protected by the First Amendment. 16 Media. L. Rep. 2241. 28. *Smith v. Linn*, 563 A.2d 123 (Pa. Super. Ct. 1989). 29. *Winter v. G. P. Putnam's Sons*, 938 F.2d 1033, 1037 (9th Cir. 1991). 30. *Rice v. Paladin Enterprises*, 128 F.3d 233, 267 (4th Cir. 1997), cert. denied, 523 U.S. 1074 (1998). 31. *Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists*, 41 F. Supp. 2d 1130 (D. Ore. 1999). 32. *Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002). 33. *Communications Decency Act*, 47 U.S.C. § 230(c)(1). 34. *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008). 35. See *Roman v. City of New York*, 442 N.Y.S.2d 945 (Sup. Ct. 1981), holding that a duty of care is not owed to someone with whom a clinic had never personally dealt. 36. *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 834, 838 (5th Cir. 1989). 37. *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992). 38. See *Yuhav v. Mudge*, 322 A.2d 824 (N.J. Super. Ct. 1974), and *Walters v. Seventeen Magazine*, 241 Cal. Rptr. 101 (Ct. App. 1987). 39. *Way v. Boy Scouts of America*, 856 S.W.2d 230 (1993).

## Chapter 4

1. From the concurring opinion of Justice Stewart in *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966). 2. William L. Prosser, *Handbook of the Law of Torts* (St. Paul, Minn.: West Publishing Co., 1971), 737. 3. See *Garrison v. Louisiana*, 379 U.S. 64 (1964), in which the Court found Louisiana's criminal defamation statute unconstitutional. 4. This is similar to the working definition suggested by lawyer Bruce W. Sanford, one of the nation's top authorities on libel, in his treatise *Libel and Privacy: The Prevention and Defense of Litigation* (New York: Harcourt Brace Jovanovich, 1987), 76. 5. RESTATEMENT (SECOND) OF TORTS § 559. 6. For an example of a case based on product disparagement, see *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). 7. Melody Petersen, "Farmers' Right to Sue Grows," *New York Times*, June 1, 1999, A1. 8. *Raymer v. Doubleday & Co.*, 615 F.2d 241, 244 (5th Cir. 1980). 9. *Corporate Training Unlimited, Inc. v. National Broadcasting Co.*, 868 F. Supp. 501 (E.D.N.Y. 1994). 10. For example, *Sierra Breeze v. Superior Court*, 149 Cal. Rptr. 914 (Ct. App. 1978). 11. For example, *Schermerhorn v. Rosenberg*, 426 N.Y.S.2d 274 (App. Div. 1980). 12. *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998). 13. *Moriarty v. Lippe*, 249 A.2d 326, 333 (Conn. 1972). 14. *Evarts v. Downey*, 16 Media L. Rep. 2449 (N.Y. Sup. Ct. 1989). 15. *Newton v. National Broadcasting Co.*, 930 F.2d 662, 666 (9th Cir. 1990). 16. *Newton v. National Broadcasting Co.*, 677 F. Supp. 1066, 1067 (D. Nev. 1987). 17. *Turner v. KTRKTv, Inc.*, 38S.W.3d 103, 118 (2001). 18. *Towne v. Eisner*, 245 U.S. 418, 425 (1918). 19. *Drotzmanns, Inc. v. McGraw-Hill, Inc.*, 500 F.2d 830 (8th Cir. 1974). 20. *Cardiff v. Brooklyn Eagle*, 75 N.Y.S.2d 222 (Sup. Ct. 1947). 21. *Noonan v. Staples*, 556 F.3d 20 (1st Cir. 2009). 22. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). 23. *Hepps*, 786. 24. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 4 (1990). 25. *Milkovich*, 18. 26. These factors were articulated in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), a pre-*Milkovich* opinion that proved highly influential for courts around the country. 27. *Moyer v. Amador Valley Joint Union High School Dist.*, 275 Cal. Rptr. 494 (Ct. App. 1990). 28. *Stevens v. Tillman*, 661 F. Supp. 702 (N.D. Ill. 1986). 29. *Gaylord Broadcasting Co. v. Francis*, 7 S.W.3d 279 (Tex. 1999). 30. *Riley v. Harr*, 292 F.3d 282, 289 (1st Cir. 2002). 31. *Immuno AG v. Moor-Jankowski*, 566 N.Y.S.2d 906, 917 (1991). 32. *Harris v. Minvielle*, 19 So. 925, 928 (La. 1896). 33. *Michigan United Conservation Club v. CBS News*, 665 F.2d 110, 112 (6th Cir. 1981). 34. RESTATEMENT



(SECOND) OF TORTS, comment to § 564A. 35. *Neiman-Marcus Co. v. Lait*, 107 F. Supp. 96 (D.N.Y. 1952). 36. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). 37. *Sullivan*, 254, 279. 38. *Herbert v. Lando*, 441 U.S. 153 (1979). 39. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). 40. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989). 41. *World Boxing Council v. Cosell*, 715 F. Supp. 1259 (S.D.N.Y. 1989). 42. *Newson v. Henry*, 443 So. 2d 817 (Miss. 1983). 43. *Meisler v. Gannett Co.*, 12 F.3d 1026 (11th Cir. 1994). 44. *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29, 43 (1971). 45. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). 46. *Kassel v. Gannett Co. Inc.*, 16 Media L. Rep. 1814, 1821 (1st Cir. 1989). 47. *Gertz*, 366. 48. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). 49. For example, compare *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101 (Okla. 1978), and *Richmond Newspapers, Inc. v. Lipscomb*, 362 S.E.2d 32 (Va. 1987). 50. See *Garrison v. Louisiana*, 379 U.S. 64 (1964). 51. *Associated Press v. Walker and Curtis Publishing Co. v. Butts*, reported together at 388 U.S. 130 (1967). 52. *Rosanova v. Playboy Enterprises*, 411 F. Supp. 440, 443 (S.D. Ga. 1976). 53. See *Wolston v. Reader's Digest Association*, 443 U.S. 157 (1979): A man who was cited for contempt because of his failure to testify before a grand jury investigating Soviet spy activities had not thrust himself into the controversy over espionage; held not a public figure. 54. *Bose Corp. v. Consumers Union*, 508 F. Supp. 1249 (D. Mass. 1981). 55. *Rosanova v. Playboy Enterprises*, 580 F.2d 859 (5th Cir. 1978). 56. *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1235 (6th Cir. 1981). 57. See *Vitale v. National Lampoon, Inc.*, 449 F. Supp. 442 (E.D. Pa. 1978) and *Pring v. Penthouse Intl., Ltd.*, 695 F.2d 438 (10th Cir. 1982). 58. See *Logan v. District of Columbia*, 447 F. Supp. 1328 (1978), and *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924 (1982). 59. See Andrew Radolf, "Landmark Libel Case?" *Editor & Publisher*, May 20, 1989, 9–10. 60. *Gertz*, 349. 61. Examples, as of this writing, included *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161 (1975) (Massachusetts), and *Wheeler v. Green*, 593 P.2d 777 (1979) (Oregon). 62. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985). 63. *Newell v. Field Enterprises, Inc.*, 415 N.E.2d 434, 446–47 (Ill. App. Ct. 1980). 64. *Stokes v. CBS Inc.*, 25 F. Supp. 2d 992 (Minn. 1998). 65. *Friedman v. Israel Labour Party*, 957 F. Supp. 701 (E.D. Pa., 1997). 66. RESTATEMENT (SECOND) OF TORTS § 611 comment i. 67. *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977). 68. In re *United Press International*, 16 Media L. Rep. 2401, 2407 (D.D.C. 1989). 69. *Norton v. Glenn*, 860 A.2d 48 (Penn. Supreme Court, 2004), cert. denied, *Troy Publishing Co. v. Norton*, 125 S. Ct. 1700 (2005). 70. *Gay v. Williams*, 486 F. Supp. 12 (D. Alaska 1979). See also *Brown v. Courier-Herald Publishing Co.*, 700 F. Supp. 534 (S.D. Ga. 1988). 71. Cal. Civ. Code § 48a. 72. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). 73. *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal. App. 4th 855 (1995). 74. Under the RESTATEMENT (SECOND) OF TORTS § 581(1), "one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character." 75. *Cubby v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991). 76. *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995). 77. 47 U.S.C. § 230. 78. *Zeran v. America Online, Inc.*, 129 F.3d 327, 329–31 (4th Cir. 1998), cert. denied, 524 U.S. 937. 79. See *Grace v. eBay Inc.*, 120 Cal. App. 4th 984 (2004), for a court opinion representing the minority view that § 230 did not intend to eliminate the traditional rules for distributor-level liability. 80. *GW Equity v. Xcentric Ventures*, 2009 U.S. Dist. LEXIS 1445. 81. *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008). 82. *It's in the Cards, Inc. v. Fuschetto*, 535 N.W.2d 11 (Wisc. App. 1995). 83. *John Doe No. 1 v. Patrick Cahill*, Supreme Court of Delaware, 2005 Del. LEXIS 381. 84. *Burnett v. National Enquirer*, 193 Cal. Rptr. 206 (Ct. App. 1983).

## Chapter 5

1. *Warren and Brandeis*, "The Right of Privacy," 4 Harv. L. Rev. 193, 196 (1890). 2. RESTATEMENT (SECOND) OF TORTS § 652C comment d. 3. *Zacchini v. Scripps-Howard Broadcasting Co.*,

97 S. Ct. 2849 (1977). 4. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727 (S.D.N.Y. 1978). 5. *Murray v. New York Magazine*, 267 N.E.2d 256 (N.Y. 1971). 6. *Spellman v. Simon & Schuster*, 3 Media L. Rep. 2406 (N.Y. Civ. Ct. 1978). 7. *Solano v. Playgirl, Inc.*, 292 F.3d 1078 (9th Cir. 2002). 8. *Bosley v. WildwetT.com*, 310 F. Supp. 2d 914 (N.D. Ohio 2004), 2004 U.S. App. LEXIS 11028. 9. *Anderson v. Fisher Broadcasting Co.*, 712 P.2d 803 (Ore. 1986). 10. *Cher v. Forum International, Ltd.*, 692 F.2d 634 (9th Cir. 1982). 11. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983). 12. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). 13. *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360 (S.D.N.Y. 1988). 14. *White v. Samsung Electronics*, 971 F.2d 1397 (9th Cir. 1992). 15. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001). 16. *Psenicska v. Twentieth Century Fox*, 36 Media L. Rep. 2281 (S.D. N.Y. 2008). 17. For a case that addresses details of the surviving right, see *The Martin Luther King Center v. American Heritage Products*, 296 S.E.2d 697 (Ga. 1982). 18. CAL. CIV. CODE § 3344.1. 19. *Comedy III Productions v. Gary Saderup, Inc.*, 80 Cal. Rptr. 2d 464 (1998). 20. See *Factors etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), in which the court ruled against a poster of Elvis Presley that contained the words "In Memory" and the date of the singer's death as a mere use of his likeness and not protected expression about a newsworthy event. 21. *Neff v. Time, Inc.*, 406 F. Supp. 858 (W.D. Pa. 1976). 22. *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964). 23. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494 (1975). 24. *Cox Broadcasting*, 496. 25. *Times Mirror Co. v. Superior Court (Doe)*, 244 Cal. Rptr. 556 (Ct. App. 1988). 26. *Virgil v. Sports Illustrated*, 424 F. Supp. 1286, 1289 (S.D. Cal. 1976). 27. *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901 (Tex. Ct. App. 1991). 28. *Diaz v. Oakland Tribune*, 188 Cal. Rptr. 762 (1983). 29. See *Doe v. Roe*, 400 N.Y.S.2d 668 (Sup. Ct. 1977), in which a New York court enjoined distribution of a book about plaintiff's psychiatric treatment. 30. *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989). 31. *Melvin v. Reid*, 297 P. 91 (Cal. 1931). 32. *Leverton v. Curtis Publishing Co.*, 192 F.2d 974, 977-78 (3d Cir. 1951). 33. *Denver Publishing Co. v. Bueno*, 54 P.3d 893 (Colo. 2002). 34. *Jews For Jesus, Inc. v. Rapp*, 997 So.2d 1098 (Fla. 2008). 35. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 248 (1974). 36. *Time, Inc. v. Hill*, 385 U.S. 374 (1967). 37. For example, the Supreme Courts of Texas and North Carolina have both declined to recognize the tort of false light. *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994); *Renwick v. News and Observer*, 312 S.E.2d 405 (N.C. 1984). 38. *Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282, 1288 (N.D. Ill. 1986). 39. *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668 (Ct. App. 1986). 40. *Mark v. King Broadcasting*, 618 P.2d 512, 519 (Wash. Ct. App. 1980). 41. *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. Sup. Ct. 1998). 42. *California v. Greenwood*, 486 U.S. 35 (1988). 43. *Shulman*, 493-94. 44. *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971). 45. *Dietemann*, 249. 46. *Desnick v. American Broadcasting Cos., Inc.*, 44 F.3d 1345, 1353 (7th Cir. 1995). 47. *Medical Laboratory Management Consultants v. ABC, Inc.*, 306 F.3d 806 (9th Cir. 2002). 48. *Sanders v. ABC*, 978 P.2d 67 (Cal. Sup. Ct. 1999). 49. *Taus v. Loftus*, 40 Cal. 4th 683 (2007). For a contrary view, see *Humphers v. First Interstate Bank of Oregon*, 696 P.2d 527 (1985). 50. *Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972), 487 F.2d 986 (2d Cir. 1973), 533 F. Supp. 1076 (S.D.N.Y. 1982). 51. *Galella*, 353 F. Supp. at 227-28. 52. *Pearson v. Dodd*, 410 F.2d 701, 705 (D.C. Cir. 1969). 53. For example, see *Wilkins v. NBC*, 84 Cal. Rptr. 2d 329 (Ct. App. 1999), concerning a *Dateline NBC* investigation of the pay-per-phone-call industry; and *Deteresa v. ABC*, 121 F.3d 460 (9th Cir. 1997), concerning secret audiotaping of O. J. Simpson's flight attendant. 54. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999). 55. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). 56. *Hustler*, 50. 57. *Armstrong v. H & C Communications, Inc.*, 575 So. 2d 280, 282 (1991). 58. *KOVR-TV, Inc. v. Superior Court*, 37 Cal. Rptr. 2d 431, 435 (1995). 59. See the Protection From Personal Intrusion Act of 1997, H.R. 2448, 105th Cong., the Personal Privacy Protection Act, S. 2103, 105th Cong. (1998), and the Personal Privacy Protection Act, H.R. 97, 106th Cong. (1999). 60. CAL. CIV. CODE § 1708.8. 61. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). 62. 18 U.S.C. § 2511. 63. *In re King World Productions, Inc.*, 898

F.2d 56 (6th Cir. 1990). 64. FLA. STAT. § 934.01–934.03. 65. CAL. PENAL CODE § 630–632. 66. Tex. Penal Code § 16.02(c)(4). 67. Cal. Penal Code § 632.5 (Deering's 2009). 68. 47 C.F.R. § 73.1206. 69. 18 U.S.C. § 2511(1)(C). 70. *Bartnicki v. Vopper*, 532 U.S. 514, 534–35 (2001). 71. For example, see *Nader v. General Motors Corp.*, 255 N.E.2d 765 (N.Y. 1970). 72. For example, see *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Penn. 1996). 73. 18 U.S.C. §§ 2701 et seq. 74. *Jessup-Morgan v. America Online, Inc.*, 20 F. Supp. 2d 1105 (E.D. Mich. 1998). 75. *Konop v. Hawaiian Airlines*, 302 F.3d 868 (9th Cir. 2002). 76. The Children's Online Privacy Protection Act is codified at 15 U.S.C. §§ 6501–6506. 77. 18 U.S.C.S. § 1039 (2009).

## Chapter 6

1. *Houchins v. KQED, Inc.*, 438 U.S. 1, 2594 (1978). 2. See *Le Mistral, Inc. v. Columbia Broadcasting System*, 402 N.Y.S.2d 815 (App. Div. 1978), in which a television station was held liable for trespass. 3. See *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345, 1351–52 (7th Cir. 1995). 4. *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 792 (Minn. Ct. of Appeals, 1998). 5. *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668 (Ct. App. 1986). 6. *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976). 7. *Wilson v. Layne*, 526 U.S. 603 (1999). 8. *Hanlon v. Berger*, 526 U.S. 808 (1999). 9. *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997). 10. CAL. PENAL CODE § 602. 11. *Stahl v. State*, 665 P.2d 839 (Okla. Crim. 1983). 12. See CAL. PENAL CODE § 409.5 (2000), which outlines the authority of peace officers to close disaster areas and specifies an exception for newsmen. 13. *Leiserson v. City of San Diego*, 229 Cal. Rptr. 22 (Ct. App. 1986). 14. See *State v. Lashinsky*, 404 A.2d 1121 (1979), in which New Jersey's Supreme Court upheld the conviction of a press pass-carrying photographer for arguing with a state trooper at the scene of a fatal automobile accident. 15. *Daily Herald v. Munro*, 838 F.2d 380 (9th Cir. 1988). See also *National Broadcasting Co. v. Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988). 16. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). 17. *Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009). 18. The Government in the Sunshine Act begins at 5 U.S.C. § 552b. 19. The Freedom of Information Act is at 5 U.S.C. § 552. 20. *Public Citizen, Inc. v. OMB*, 2009 U.S. App. LEXIS 13277 (D.C. Cir.). 21. See 13 U.S.C. § 9. 22. See 26 U.S.C. § 6103. 23. See 35 U.S.C. § 122. 24. *Justice Department v. Julian*, 486 U.S. 1 (1988). 25. *United States v. Nixon*, 418 U.S. 683 (1974). 26. *The New York Times v. NASA*, 920 F.2d 1002 (D.C. Cir. 1990). 27. U.S. Department of Justice v. Reporter's Committee for Freedom of the Press, 489 U.S. 749, 764 (1989). 28. *Reporter's Committee*, 774. 29. *National Archives and Records Admin. v. Favis*, 541 U.S. 157, 165 (2004). 30. 5 U.S.C. § 552(a)(6)(E). 31. *ACLU v. Department of Justice*, 265 F. Supp. 2d 20 (D.D.C. 2003). 32. The Electronic Freedom of Information Act Amendments, Pub. L. No. 104–231, 110 Stat. 3048, 1–12 (1996) (codified in various sections of 5 U.S.C. § 552). 33. See M. L. Stein, "Access to Drivers' Records Limited," *Editor & Publisher*, Sept. 23, 1989, 28. 34. *Borreca v. Fasi*, 369 F. Supp. 906, 909 (D. Haw. 1974). 35. *Snyder v. Ringgold*, 40 F. Supp. 2d 714 (Dist. of Md., 1999). 36. *Los Angeles Free Press, Inc. v. City of Los Angeles*, 88 Cal. Rptr. 605, 609–10 (Ct. App. 1970). 37. COLO. REV. STAT. § 24–72–204.

## Chapter 7

1. For example, in 1991, the State Bar of California sponsored a survey to determine the "legal literacy" level of adults in that state. The president of the state bar gave Californians a "C" on their knowledge of the legal system and concluded, "The test scores reveal that our citizens are dangerously misinformed about basic laws which permeate their day-to-day lives." *California Lawyer*, June 1991, p. 68. 2. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 547, 561 (1976). 3. *Irvin v. Dowd*, 366 U.S. 717, 727 (1961). 4. *Rideau v. State of Louisiana*, 373 U.S. 723, 726 (1963). 5. *Sheppard v. Maxwell*, 384 U.S. 333, 348 (1966). 6. *Sheppard*, 355–62. 7. *Report of the President's Commission on the Assassination of John F. Kennedy* (Washington, D.C.: U.S. Government Printing Office, 1964), 231–40. 8. Rita J. Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 Stan L. Rev. 515 (Feb. 1977). 9. John Kaplan, *Of Babies and Bathwater*, 29 Stan L. Rev. 621 (Feb. 1977). 10. American Bar Association, *Standards Relating to Fair Trial and Free Press* (1968). 11. *Nebraska Press*,

559. **12.** *Nebraska Press*, 570. **13.** *C.B.S. v. U.S. District Court*, 729 F.2d 1174, 1180 (9th Cir. 1984). **14.** *Procter & Gamble v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996). **15.** *Ex parte State Record Co.*, 504 S.E.2d 592 (S.C. 1998). **16.** See “CNN Noriega Tapes Gag Order Stands,” *The News Media & the Law*, winter 1991, 6–7. **17.** *People v. Bryant*, 94 P.3d 624 (Colo. 2004). **18.** Jamie Satterfield, *Judge won't seek to limit online comments on carjack case*, *The Knoxville News Sentinel* (April 14, 2009), <http://www.knoxnews.com>. **19.** *Criminal Action v. McVeigh*, 964 F. Supp. 313 (D. Colo. 1997). **20.** *ABA Model Rules of Professional Conduct*, Rule 3.6(a) (1983). **21.** *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). **22.** *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). **23.** *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 561 (1980). **24.** *Richmond Newspapers*, 573. **25.** *Richmond Newspapers*, 576, 580. **26.** *Richmond Newspapers*, 581. **27.** *Richmond Newspapers*, 582. **28.** *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). **29.** *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984). **30.** *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 4 (1986). **31.** *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002). **32.** *KQED, Inc. v. Vasquez*, C-90-1383, 1991 U.S. Dist. LEXIS 19791 (N.D. Cal. 1991); *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977). **33.** For example, see *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16 (2d Cir. 1984). **34.** For example, see *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985). **35.** *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). **36.** *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002). **37.** *In re J.S.*, 438 A.2d 1125 (Vt. 1981). **38.** *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). **39.** *Jeffries v. State of Mississippi*, 724 So. 2d 897 (Miss. 1998). **40.** *Estes v. Texas*, 381 U.S. 532 (1965). **41.** *Chandler v. Florida*, 449 U.S. 560, 574 (1981). **42.** *Press-Enterprise II*, 13. **43.** For example, see *In re Application of CBS, Inc. (Salerno)*, 828 F.2d 958 (2d Cir. 1987). **44.** *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972). **45.** *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995). **46.** *United States v. Smith*, 135 F.3d 963, 970–71 (5th Cir. 1998). **47.** *Waterloo/Cedar Falls Courier v. Hawkeye Community College*, 646 N.W.2d 97 (Iowa 2002). **48.** *Delaney v. Superior Court*, 789 P.2d 934 (Cal. 1990). **49.** For a case in which the court ordered a media defendant to disclose its news source, see *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980). For a case in which a disclosure order was overturned, see *Mitchell v. Superior Court*, 690 P.2d 625 (Cal. 1984). **50.** *Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d 667 (Mass. 2005). **51.** *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). **52.** *Cohen v. Cowles Media Co.*, 479 N.W.2d 387 (Minn. 1992). **53.** *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). **54.** 42 U.S.C. § 2000aa. **55.** *In re Farber*, 394 A.2d 330 (N.J. 1978). Farber was released when the defendant was found not guilty of homicide. **56.** See *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972). **57.** See *In re Providence Journal*, 820 F.2d 1342 (1st Cir. 1986), and *In re Misener*, 213 Cal. Rptr. 569 (1985). **58.** *U.S. v. Cable News Network, Inc.*, 865 F. Supp. 1549 (1994). **59.** See *Bridges v. State of California*, 314 U.S. 252 (1941).

## Chapter 8

**1.** The Copyright Act of 1976 is contained in Title 17 of the UNITED STATES CODE. **2.** 17 U.S.C. § 102(a). **3.** 17 U.S.C. § 102(a). **4.** See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), holding that the degree of complexity and development is what separates unprotected literary ideas from protected characters and sequences. **5.** 17 U.S.C. § 103. **6.** *J. R. O'Dwyer Co. v. Media Marketing Int.*, 755 F. Supp. 599 (1991). **7.** *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 357 (1991). **8.** See *Williams v. Weisser*, 78 Cal. Rptr. 542 (Ct. App. 1969), involving unauthorized distribution of a professor's class notes. **9.** See, for example, *Hollywood Screentest of America v. NBC Universal*, 151 Cal. App. 4th 631 (2007). **10.** See *Chamberlain v. Feldman*, 89 N.E.2d 863 (N.Y. 1949), regarding the ownership rights in a Mark Twain manuscript. **11.** 17 U.S.C. § 201(b). **12.** *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). **13.** 17 U.S.C. § 101. **14.** Definitions of forty copyright terms are found in Section 101 of the act. **15.** 17 U.S.C. § 105. **16.** For example, see *Georgia v. Harrison Co.*, 548 F. Supp. 110 (N.D. Ga. 1982), holding that state statutes are not subject to copyright protection. **17.** The duration provisions are found in Sections 302 to 304 of the Copyright Act. **18.** *Estate of Martin Luther King v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999). **19.** *Eldred v. Ashcroft*, 537 U.S.

186 (2003). **20.** In the 1980s, ten states enacted moral rights legislation, led by California's Art Preservation Act, CAL. CIV. CODE § 987. The other states were Connecticut, Louisiana, Massachusetts, Maine, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island. **21.** See 17 U.S.C. § 106A. **22.** 17 U.S.C. § 401(a). **23.** 17 U.S.C. § 106. **24.** *Rogers v. Koons*, 751 F. Supp. 474 (S.D.N.Y. 1990). **25.** *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180 (S.D.N.Y. 1976). **26.** 17 U.S.C. § 504(c). **27.** *RSO Records, Inc. v. Peri*, 596 F. Supp. 849 (S.D.N.Y. 1984). **28.** 17 U.S.C. § 2319. **29.** 17 U.S.C. § 204(a). **30.** *New York Times Co. v. Tasini*, 533 U.S. 483, 500 (2001). **31.** *Greenberg v. National Geographic Society*, 244 F.3d 1267 (11th Cir. 2001). **32.** One of the leading storecasting cases is *Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84 (2d Cir. 1981). See also *International Korwin Corp. v. Kowalczyk*, 855 F.2d 375 (7th Cir. 1988). **33.** 17 U.S.C. § 114(a). In 1978 the Register of Copyrights recommended to Congress that performance rights be added for sound recordings. Bills to that effect have been introduced, but have not passed. **34.** See *Fortnightly 526 Corp. v. United Artists*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.*, 415 U.S. 394 (1974). **35.** 17 U.S.C. § 111. **36.** 17 U.S.C. § 119. **37.** Pub. L. No. 108–419, 118 Stat. 2341 (2004). **38.** Office of the United States Trade Representative, 2009 Special 301 Report, p. 13 (April 30, 2009). **39.** *Basic Books, Inc. v. Kinko's Graphics*, 758 F. Supp. 1522, 1531 (S.D.N.Y. 1991). **40.** *Kinko's*, 1534. **41.** *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). **42.** *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 545–46 (1985). **43.** 567. **44.** *Harper & Row*, 590. **45.** *Los Angeles News Service v. KCAL-TV*, 108 F.3d 1119 (9th Cir. 1997). **46.** *Fairey v. Associated Press*, No. 2009-cv-01123 (S.D. N.Y. filed Feb. 9, 2009). **47.** *Calkins v. Playboy Enterprises, Inc.*, 561 F. Supp. 2d 1136 (E.D. Cal. 2008). **48.** *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). For a contrasting case, see *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), in which the copying of Disney cartoon characters was too extensive to qualify as fair use. **49.** *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008). **50.** Jane C. Ginsburg, *Putting Cars on the Information Superhighway: Authors, Exploiters, and Copyright in Cyberspace*, 95 Colum. L. Rev. 1466, 1467 (Oct. 1995). **51.** Pew Internet & American Life Project, "Downloading Free Music: Internet Music Lovers Don't Think It's Stealing," Sept. 28, 2000. (See [www.pewinternet.org](http://www.pewinternet.org).) **52.** *Playboy Enterprises v. Frena*, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993). **53.** Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512. **54.** From plaintiffs' complaint, *Viacom International v. YouTube*, No. 07-cv-2103 (S.D. N.Y. filed March 13, 2007). **55.** *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). **56.** *MGM Studios v. Grokster*, 545 U.S. 913 (2005). **57.** Amy Forliti, *Woman seeks to decrease \$1.92M fine for downloads*, Associated Press Online, July 7, 2009. **58.** *Lanham Act*, 15 U.S.C. § 1051 et. seq. **59.** *Miller Brewing Co. v. G. Heileman Brewing Co.*, 561 F.2d 75 (7th Cir. 1977). **60.** *Playboy Enterprises, Inc. v. Chuckle-berry Publishing, Inc.*, 687 F.2d 563 (2d Cir. 1982). **61.** *Time, Inc. v. Petersen Publishing Co.*, 173 F.3d 113 (2d Cir. 1999). **62.** 15 U.S.C. § 1125(c), 1127. **63.** *Anheuser-Busch, Inc. v. Balducci Publications*, 28 F.3d 769 (8th Cir. 1994). **64.** *Planned Parenthood v. Bucci*, 1997 U.S. Dist. LEXIS 3338 (S.D.N.Y. 1997). **65.** Pub. L. No. 106–113 (1999), codified primarily at 15 U.S.C. § 1125(d)(1). **66.** *Victoria's Secret Stores v. Artco Equipment Co.*, 194 F. Supp. 2d 704 (S.D. Ohio 2002). **67.** *Roland Buck, Verizon Awarded \$33.2 M in Domain Name Dispute*, Domain Name Industry News, Dec. 24, 2008, at [www.domainnews.com](http://www.domainnews.com). **68.** *International News Service v. Associated Press*, 248 U.S. 215, 239 (1918). **69.** *NBA v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997). **70.** *Orion Pictures Co., Inc. v. Dell Publishing Co., Inc.*, 471 F. Supp. 392 (S.D.N.Y. 1979).

## Chapter 9

**1.** *NBC v. United States*, 319 U.S. 190, 212 (1943). **2.** 47 U.S.C. § 301. **3.** 47 U.S.C. § 326. **4.** See 47 U.S.C. § 303. The phrase *public interest* also appears in § 307(a). **5.** U.S. Const., art. I, § 8. **6.** *U.S. v. Nelson Brothers*, 289 U.S. 266 (1933). **7.** *Trinity Methodist Church v. FRC*, 62 F.2d 850 (D.C. Cir. 1932). **8.** *Near v. Minnesota*, 283 U.S. 697 (1931). **9.** *NBC v. United States*, 319 U.S. 190 (1943). **10.** *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986). **11.** *FCC v. League of Women Voters of California*, 468 U.S. 364, 376 n.11 (1984). **12.** The Administrative Procedure Act is codified in Title 5 of the UNITED STATES

CODE, beginning at § 551. 13. Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 F.C.C.R. 638 (1988). 14. Office of Communications of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). 15. For a good summary of the now defunct comparative evaluation process, see *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 604–7 (D.C. Cir. 1984). 16. *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993). 17. 47 U.S.C. § 309(j). 18. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978). 19. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990). 20. *Metro Broadcasting*, 581. 21. *Metro Broadcasting*, 602. 22. *Metro Broadcasting*, 612. 23. *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992). 24. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). 25. 47 U.S.C. § 307(c). 26. 47 C.F.R. § 73.3526. 27. Telecommunications Act of 1996, § 204 (codified at 47 U.S.C. § 309). 28. *Robinson v. FCC*, 334 F.2d 534 (D.C. Cir. 1964). 29. *In re Application of the Trustees of the University of Pennsylvania*, 69 F.C.C.2d 1394 (1978). 30. 47 U.S.C. § 310(d). 31. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 601, 604 (1981). 32. *Fox TV Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), and *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). 33. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004). 34. 47 C.F.R. § 73.3555(a). 35. 47 C.F.R. § 73.3555(b). 36. 47 C.F.R. § 73.3555(c). 37. 47 C.F.R. § 73.3555(d). 38. 47 C.F.R. § 73.3555(e). 39. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). 40. 47 C.F.R. § 73.658(g). 41. The Cable Act provision is at 47 U.S.C. § 533(f), and the FCC regulations are at 47 C.F.R. § 76.503-04. 42. *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2001). 43. *Comcast Corp. v. FCC*, 579 F.3d 1, 17–18 (D.C. Cir. 2009). 44. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354–55 (D.C. Cir. 1998). 45. *MD/DC/DE Broadcasters Assoc. v. FCC*, 236 F.3d 13 (D.C. Cir. 2001). 46. Broadcast EEO rules are at 47 C.F.R. § 73.2080; cable EEO rules are at 47 C.F.R. § 76.75.

## Chapter 10

1. *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32 (1929). 2. *Great Lakes Broadcasting Co. v. Federal Radio Commission*, 37 F.2d 993 (D.C. Cir. 1930). 3. Julie Carr Smyth, “Treasurer Candidate to Get Free Radio Ads,” *The Cleveland Plain Dealer*, July 18, 2002, B5. 4. Adrian Weiss, 58 F.C.C.2d 342 (1976). 5. 47 U.S.C. § 315(a). 6. *Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987). 7. *In the Matter of Equal Opportunities Complaint filed by Angelides for Governor Campaign*, DA 06-2098 (F.C.C. Oct. 26, 2006). 8. *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir. 1976). 9. *Petitions of Henry Geller et al.*, 95 F.C.C.2d 1236 (1983). 10. *Farmers Educational & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525 (1959). 11. See Nicholas Zapple, 23 F.C.C.2d 707 (1970). 12. *CBS, Inc. v. FCC*, 453 U.S. 367, 386–87 (1981). 13. Letter to Michael Levinson, 7 F.C.C.R. 1457 (1992). 14. *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987). The commission’s authority to repeal the fairness doctrine was upheld in *Syracuse Peace Council v. FCC*, 867 F.2d 654 (1989). 15. *Radio-Television News Directors Assoc. v. FCC*, 229 F.3d 269 (D.C. Cir. 2000). 16. *Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998). 17. *Children’s Television Act of 1990*, 47 U.S.C. §§ 303a, 303b, 394. 18. 56 Fed. Reg. 19611 (1991). 19. 47 C.F.R. § 73.671. 20. *In the Matter of Channel Eleven, Inc.*, DA 08-1506 (F.C.C. July 2, 2008). 21. 47 U.S.C. § 317 and 47 C.F.R. § 73.1212. 22. 47 C.F.R. § 73.1217. 23. 47 C.F.R. § 73.1216. 24. *In the Matter of CBS Radio East, Inc.*, DA 09-189 (F.C.C., Feb. 5, 2009). 25. Jim Rutenberg, “Survey Shows Few Parents Use TV V-Chip,” *New York Times*, July 25, 2001, E1. 26. *United States v. O’Brien*, 391 U.S. 367 (1968). 27. *Turner Broadcasting System v. FCC*, 512 U.S. 622, 637–39 (1994). 28. This controversy was handled by the federal District Court through a number of separate orders. For a summary, see *Preferred Communications, Inc. v. City of Los Angeles*, 13 F.3d 1327 (9th Cir. 1994). 29. The 1984 Cable Act is codified at 47 U.S.C. §§ 521–59. 30. *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995). 31. *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 747 (1996) (together with *Alliance for Community Media v. FCC*). 32. *Missouri Knights of the Ku Klux Klan v. Kansas City*, 723 F. Supp. 1343 (W.D. Mo. 1989). 33. *Horton v. City of Houston*, 179 F.3d 188 (5th Cir. 1999). 34. *Demarest v. Athol/Orange Community Television, Inc.*, 188 F. Supp. 2d 82 (Mass. 2002). 35. For the must-carry statutes and regulations, see 47 U.S.C. §§ 534,

535 and 47 C.F.R. § 76.56. 36. *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) (Turner II). 37. The retransmission consent statute and regulations are at 47 U.S.C. § 325(b)(1) and 47 C.F.R. § 76.64. 38. 47 C.F.R. § 76.205 (equal opportunities for origination cablecasts by political candidates). 39. 47 C.F.R. § 76.225 (commercial limits during children's cable programs). 40. 47 C.F.R. § 76.1615 (sponsorship identification on cable TV). 41. *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985). 42. 47 C.F.R. § 76.101 (syndicated program exclusivity). 43. 47 C.F.R. § 76.92 (network non-duplication). 44. 17 U.S.C. § 122. 45. 47 U.S.C. § 338(a). 46. *Satellite Broadcasting & Communications Assn. v. FCC*, 275 F.3d 337 (4th Cir. 2001).

## Chapter 11

1. Jean Seligmann, "A New Survey on Sex," *Newsweek*, September 17, 1990, p. 72. 2. Attorney General's Commission on Pornography, *Final Report* (Washington, D.C.: U.S. Department of Justice, 1986), 233–40. 3. 18 U.S.C. § 1461. 4. See Frederick Schauer, *The Law of Obscenity* (Washington, D.C.: Bureau of National Affairs, 1976), 8–29. 5. See *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930) (conviction overturned on appeal). 6. See generally, Paul S. Boyer, *Purity in Print: The Vice-Society Movement and Book Censorship in America* (New York: Scribners, 1968). 7. *Roth v. United States*, 354 U.S. 476 (1957). 8. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973). 9. *Paris Adult Theatre*, 103. 10. *Miller v. California*, 413 U.S. 15 (1973). 11. The Court discussed the meaning of prurient interest in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985). 12. *Miller*, 32. 13. *Jenkins v. Georgia*, 418 U.S. 153, 160–61 (1974). 14. *Kaplan v. California*, 413 U.S. 115, 116–17 (1973). 15. *Pope v. Illinois*, 481 U.S. 497, 500 (1987). 16. Attorney General's *Final Report*, 271. 17. *State v. Walden Book Co.*, 386 So. 2d 342, 346 (La. 1980). 18. *Walden Book Co.*, 349. 19. *Penthouse v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980). 20. *New York v. Ferber*, 458 U.S. 747 (1982). 21. 18 U.S.C. § 2251. 22. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). 23. *U.S. v. Williams*, 128 S. Ct. 1830 (2008). 24. Attorney General's *Final Report*, 368. @24. *Castillo v. The State of Texas*, 79 S.W.3d 817 (Tex. 2002). @25. *State of Wisconsin v. Trochinski*, 644 N.W.2d 891 (Wis. 2002). 25. 18 U.S.C. §§ 1461, 1462. 26. 18 U.S.C. §§ 1464, 1468. 27. 19 U.S.C. § 1305. 28. 47 U.S.C. § 223. 29. *U.S. v. Pryba*, 900 F.2d 748, 755 (4th Cir. 1990). 30. *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989). 31. *Glass v. State*, 761 S.W.2d 806 (Tex. 1988). 32. *Beier v. State*, 681 S.W.2d 124 (Tex. 1984). 33. *Stanley v. Georgia*, 394 U.S. 557 (1969). 34. For example, see *United States v. 12 200-Ft. Reels*, 413 U.S. 123 (1973). 35. *Osborne v. Ohio*, 495 U.S. 103 (1990). 36. *Mutual Film Corp. v. Ohio Industrial Commission*, 236 U.S. 230 (1915). 37. *Burstyn v. Wilson*, 343 U.S. 495, 501 (1952). 38. *Freedman v. Maryland*, 380 U.S. 51 (1965). 39. *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980). 40. See *Rowan v. Post Office*, 397 U.S. 728 (1970), and *Pent-R-Books v. U.S. Postal Service*, 328 F. Supp. 297 (E.D.N.Y. 1971). 41. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). 42. *Alameda Books v. City of Los Angeles*, 2008 U.S. Dist. LEXIS 108860 (C.D. Ca. 2008). 43. 20 U.S.C. § 954(d)(1). 44. *National Endowment v. Finley*, 524 U.S. 569 (1998). 45. *American Booksellers Association v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985). 46. *American Booksellers*, 329. 47. *American Booksellers*, 327–28. 48. *Lightborne Publishing, Inc. v. Citizens for Community Values*, No. 08 Civ. 464 ((S.D. Ohio, filed July 8, 2008). 49. See 47 U.S.C. §§ 307, 308, 213(a)(6). 50. In re *Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, 56 F.C.C.2d 94, 98 (1975). 51. *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 730 (1978). 52. *Pacifica*, 748. 53. *Pacifica*, 749. 5. See 2 F.C.C.R. 2692, 2703, and 2705. 55. *Media Central (KZKC-TV)*, No. 88–213 (FCC June 23, 1988). 56. *Action for Children's Television v. Federal Communications Commission*, 932 F.2d 1504 (D.C. Cir. 1991). 57. *Action for Children's Television v. FCC*, 58 F.3d 654, 665 (D.C. Cir. 1995). 58. *Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995). 59. See "FCC Refuses to Find News Broadcasts Indecent," *The News Media & The Law*, Spring 1991, 29. 60. *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999 (2001). 61. Robert Corn-Revere, "Eye of the Beholder," *Broadcasting and Cable*, April 16, 2001, 30. 62. *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008). 63. Amy Schatz, *Indecency Complaints Pile Up at FCC*, *The Wall Street Journal*, April 28, 2009, WSJ.com. 64. *FCC v. Fox*

Television Stations, 173 L.Ed.2d 738 (2009). **65.** *Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985). **66.** *Cruz*, 1420. **67.** *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). **68.** *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). **69.** Information Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866, 872 (9th Cir. 1991). **70.** *Reno v. ACLU*, 521 U.S. 844 (1997). **71.** Child Online Protection Act, 47 U.S.C. § 231. **72.** *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004). **73.** *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008).

## Chapter 12

**1.** *FTC v. Standard Education Society*, 302 U.S. 112, 116 (1937). **2.** *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). **3.** *Breard v. Alexandria*, 341 U.S. 622 (1951), *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955), and *Capital Broadcasting Co. v. Mitchell*, 405 U.S. 1000 (1972). **4.** *Bigelow v. Virginia*, 421 U.S. 809 (1975). **5.** *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). **6.** *Virginia Pharmacy Board*, 763, 765. **7.** *Virginia Pharmacy Board*, 770. **8.** *Bates v. State Bar of Arizona*, 433 U.S. 350, 404 (1977). **9.** *Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York*, 447 U.S. 557 (1980). **10.** *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). **11.** *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983). **12.** *Bolger*, 66. **13.** *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 960 (2002). **14.** *Kasky*, 970–71. **15.** *Kasky*, 946. **16.** See 15 U.S.C. § 1335 (1999), adopted in 1969. **17.** *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995). **18.** 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). **19.** *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173 (1999). **20.** *Greater New Orleans Broadcasting*, 182. **21.** *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 562 and 564 (2001). **22.** *Consumers Union v. General Signal Corp.*, 724 F.2d 1044, 1053 (2d Cir. 1983). **23.** 15 U.S.C. § 1333 (a) and (b). **24.** See 21 U.S.C. § 343(q). **25.** 15 U.S.C. § 45(a)(1). **26.** *Edward Cox, Robert Fellmeth, and John Schulz, The Nader Report on the Federal Trade Commission* (New York: Barron Press, 1969). **27.** American Bar Association, *Report of the ABA Commission to Study the Federal Trade Commission* (1969), 3. **28.** Federal Trade Commission Improvement Act, Pub. L. 93–637, tit. 2, 88 Stat. 2193 (1975). **29.** Report of the ABA Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 Antitrust L.J., 43 (1989). **30.** 59 Fed. Reg. 28388 (1994). **31.** 15 U.S.C. § 45(a) (1999). **32.** See *Amrep Corp. v. FTC*, 768 F.2d 1171 (10th Cir. 1985). **33.** *Sears, Roebuck and Co. v. FTC*, 676 F.2d 385 (9th Cir. 1982). **34.** *Erickson v. FTC*, 272 F.2d 318 (7th Cir. 1959). **35.** *Bristol-Meyers Co. v. FTC*, 738 F.2d 554 (2d Cir. 1984). **36.** *J. B. Williams Company v. FTC*, 381 F.2d 884 (6th Cir. 1967). **37.** Federal Trade Commission v. *Colgate-Palmolive Co.*, 380 U.S. 374, 387–90 (1965). **38.** *Colgate*, 393. **39.** *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 251 (6th Cir. 1973). **40.** In the Matter of *Kellogg Company*, FTC File No. 082–3145 (July 31, 2009). **41.** In the Matter of *Constellation Brands, Inc.*, FTC File No. 092–3035 (June 10, 2009). **42.** See 16 C.F.R. § 424 and § 419 (2000). **43.** *Guides Against Deceptive Pricing*, 16 C.F.R. §§ 233.1 to 233.5 (2000). **44.** *Guide Concerning Use of the Word “Free” and Similar Representations*, 16 C.F.R. § 251.1. **45.** *Guides for the Advertising of Warranties and Guarantees*, 16 C.F.R. §§ 239.1 to 239.5. **46.** *Guides Concerning Use of Endorsements and Testimonials*, 16 C.F.R. §§ 255 to 255.5. **47.** *Disclosure of Material Connections*, 16 C.F.R. § 255.5, Example 7. **48.** See *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), in which the court upheld the corrective order, with some language modification. **49.** *Lanham Act* § 43(a), 15 U.S.C. § 1125(a). **50.** For example, see *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1376 (D.N.J. 1981). **51.** *Allen v. Men’s World Outlet, Inc.*, 679 F. Supp. 360 (S.D.N.Y. 1988). **52.** *Tambrands, Inc. v. Warner-Lambert Co.*, 673 F. Supp. 1190 (S.D.N.Y. 1987). **53.** *Coca-Cola v. Tropicana Products, Inc.*, 690 F.2d 312, 314 (2d Cir. 1982). **54.** *Spalding Sports Worldwide, Inc. v. Wilson Sporting Goods Co.*, 198 F. Supp. 2d 59 (D. Mass. 2002). **55.** For examples of state statutes pertaining to deceptive advertising, see Sections 349 and 350 of the NEW YORK GENERAL BUSINESS LAW, Section 17500 et seq. of the CALIFORNIA BUSINESS & PROFESSIONS CODE, and Section 1750 et seq. of the CALIFORNIA CIVIL CODE. **56.** *Morales v. Trans World Airlines, Inc.*, 504 U.S. 347 (1992). **57.** 15 U.S.C. 1334(B). **58.** *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994). **59.** *Mangini v. R. J. Reynolds Tobacco Co.*, 31 Cal. Rptr. 2d 358 (1994). **60.** *FTC v. Zuccrini*,



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# Case Index

- A&M Records, Inc. v. Napster, Inc.*, 359  
*Action for Children's Television v. Federal Communications Commission*, 476–477  
*Adarand Constructors, Inc. v. Pena*, 398  
*Alameda Books v. City of Los Angeles*, 471  
*American Booksellers Association v. Hudnut*, 472  
*Anderson v. Liberty Lobby, Inc.*, 150, 163  
*Anheuser-Busch, Inc. v. Balducci Publications*, 368  
*Arkansas Educational TV Commission v. Forbes*, 70  
*Ashcroft v. American Civil Liberties Union*, 486  
*Ashcroft v. Free Speech Coalition*, 459–460  
*Associated Press v. Walker*, 149, 150  
*Austin v. Michigan Chamber of Commerce*, 79, 82  
  
*Bantam Books v. Sullivan*, 50  
*Bartnicki v. Vopper*, 221  
*Basic Books, Inc. v. Kinko's Graphics*, 349  
*Bates v. State Bar of Arizona*, 494, 533  
*Bechtel v. FCC*, 395  
*Board of Regents of the University of Wisconsin v. Southworth*, 56  
*Bolger v. Youngs Drug Products Corp.*, 496  
*Borreca v. Fasi*, 263  
*Branch v. FCC*, 418  
*Brandenburg v. Ohio*, 91, 93, 107, 114  
*Branzburg v. Hayes*, 303  
*Braun v. Soldier of Fortune Magazine, Inc.*, 111–112  
*Buckley v. Valeo*, 79  
  
*C.B.S. v. U.S. District Court*, 280  
*California First Amendment Coalition v. Woodford*, 291  
*Campbell v. Acuff-Rose Music, Inc.*, 355  
*Cantrell v. Forest City Publishing Co.*, 202  
*CBS, Inc. v. FCC*, 421–422  
*C.B.S. v. U.S. District Court*, 280  
*Central Hudson Gas & Electric Co. v. Public Service Comm'n of New York*, 494  
*Chandler v. Florida*, 291, 296  
*Chaplinsky v. New Hampshire*, 65  
*Cher v. Forum International, Ltd.*, 183–184  
*Citizens United v. FEC*, 82  
*City of Los Angeles v. Preferred Communications, Inc.*, 435  
*City of Renton v. Playtime Theatres, Inc.*, 469–470  
  
*Cohen v. California*, 64, 65  
*Cohen v. Cowles Media Co.*, 311–312  
*Community for Creative Non-Violence v. Reid*, 327  
*Cox Broadcasting Corp. v. Cohn*, 192, 219  
*Creative Non-Violence v. Reid*, 327  
*Cruz v. Ferre*, 442, 482  
*Cubby v. CompuServe Inc.*, 166  
*Curtis Publishing Co. v. Butts*, 149, 150  
  
*Denver Area Educational Telecommunications Consortium v. FCC*, 438  
*Desnick v. American Broadcasting Cos., Inc.*, 209–210  
*Detroit Free Press v. Ashcroft*, 294  
*Diaz v. Oakland Tribune*, 195–197  
*Dietemann v. Time, Inc.*, 208  
*Doe v. Cahill*, 169–170  
*Doe v. MySpace, Inc.*, 109  
*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 150, 156  
  
*Edwards v. National Audubon Society, Inc.*, 159  
*Eimann v. Soldier of Fortune Magazine, Inc.*, 110–111  
*Eldred v. Ashcroft*, 331  
  
*Fair Housing Council v. Roommates*, 168  
*FCC v. Fox Television Stations*, 482  
*FCC v. League of Women Voters of California*, 83  
*FCC v. WNCN Listeners Guild*, 402–403  
*Federal Communications Commission v. Pacifica Foundation*, 474  
*Federal Trade Commission v. Colgate-Palmolive Co.*, 511  
*Feist Publications, Inc. v. Rural Telephone Service Co.*, 324–325  
*Firestone Tire & Rubber Co. v. FTC*, 513  
*First National Bank of Boston v. Bellotti*, 80  
*Florida Star v. BJJF*, 197, 219, 282–283  
*Food Lion v. ABC*, 213  
*44 Liquormart, Inc. v. Rhode Island*, 500–501  
*Freedman v. Maryland*, 466  
*FTC v. SlimAmerica, Inc.*, 518  
  
*Galella v. Onassis*, 211  
*Gertz v. Robert Welch, Inc.*, 145, 150  
*Gitlow v. New York*, 43  
  
*Globe Newspaper Co. v. Superior Court*, 287–288  
*Greater New Orleans Broadcasting Association, Inc. v. United States*, 501  
*Greenberg v. National Geographic Society*, 340  
  
*Hanlon v. Berger*, 234  
*Harper & Row Publishers v. Nation Enterprises*, 351  
*Harte-Hanks Communications, Inc. v. Connaughton*, 143, 150  
*Hazelwood School District v. Kuhlmeier*, 70  
*Herbert v. Lando*, 141, 150  
*Hosty v. Carter*, 72  
*Houchins v. KQED, Inc.*, 239  
*Hustler Magazine v. Falwell*, 11, 214  
  
*International News Service v. Associated Press*, 372  
*Irvin v. Dowd*, 273–274  
*It's in the Cards, Inc. v. Fuschetto*, 169  
  
*Jenkins v. Georgia*, 455–456  
*Jersey Media Group v. Ashcroft*, 294  
*Jessup-Morgan v. America Online, Inc.*, 223–224  
  
*Kaskey v. Nike, Inc.*, 497  
*Keller v. State Bar of California*, 56  
*Kincaid v. Gibson*, 71  
*Konop v. Hawaiian Airlines*, 224  
  
*Lorillard Tobacco Co. v. Reilly*, 502  
*Los Angeles News Service v. KCAL-TV*, 353  
*Lutheran Church–Missouri Synod v. FCC*, 410  
  
*Masson v. New Yorker Magazine, Inc.*, 142, 150  
*McConnell v. FEC*, 81, 82  
*McIntyre v. Ohio Elections Commission*, 56  
*MD/DC/DE Broadcasters Assoc. v. FCC*, 410–411  
*Melvin v. Reid*, 197–198  
*Metro Broadcasting, Inc. v. FCC*, 396–397  
*MGM Studios v. Grokster*, 360–361  
*Miami Herald Co. v. Tornillo*, 55, 384  
*Milkovich v. Lorain Journal Co.*, 131–132, 150  
*Miller v. California*, 454

- Miller v. National Broadcasting Co.*, 233  
*Morales v. Trans World Airlines, Inc.*, 525–526  
*Morse v. Frederick*, 72–73
- National Archives and Records Administration v. Favish*, 251  
*National Broadcasting Co. v. United States*, 414–415  
*National Endowment v. Finley*, 471  
*NBA v. Motorola, Inc.*, 372–373  
*NBC v. United States*, 383  
*Near v. Minnesota*, 47, 48, 51, 85, 94, 382–383, 465–466  
*Nebraska Press Association v. Stuart*, 94, 272, 279  
*New York Times Co. v. United States*, 94  
*New York Times v. Sullivan*, 120–121, 138–139, 150, 173, 203, 215–216  
*New York v. Ferber*, 459  
*Newton v. National Broadcasting Co.*, 127  
*Newton v. Newton v. National Broadcasting Co.*, 171  
*North Jersey Media Group v. Ashcroft*, 294  
*Norton v. Glenn*, 160
- Olivia N. v. National Broadcasting Co.*, 101
- Paris Adult Theatre I v. Slaton*, 452  
*Pearson v. Dodd*, 212  
*Penthouse v. McAuliffe*, 458  
*People v. Bryant*, 283  
*Philadelphia Newspapers, Inc. v. Hepps*, 130, 150  
*Playboy Enterprises v. Frena*, 357  
*Playboy Enterprises v. Netscape*, 529  
*Pope v. Illinois*, 456–457, 488  
*Press-Enterprise Co. v. Superior Court*, 288, 290, 291  
*Prometheus Radio Project v. FCC*, 405  
*Psenicka v. Twentieth Century Fox*, 188
- Radio-Television News Directors Assoc. v. FCC*, 426  
*R.A.V. v. City of St. Paul*, 52  
*Red Lion Broadcasting Co. v. FCC*, 55, 384–386, 411, 415  
*Reno v. ACLU*, 485  
*Richmond Newspapers v. Virginia*, 286, 291, 316  
*Rideau v. State of Louisiana*, 274  
*Rosanova v. Playboy Enterprises*, 151  
*Rosenbloom v. Metromedia, Inc.*, 145, 150  
*Roth v. United States*, 451–452  
*Rubin v. Coors Brewing Co.*, 500  
*Rust v. Sullivan*, 83
- Sable Communications of California, Inc. v. FCC*, 483–484, 485  
*Satellite Broadcasting & Communications Assn. v. FCC*, 444  
*Schenck v. United States*, 89  
*Seattle Times Co. v. Rhinehart*, 285  
*Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 77  
*Serafyn v. FCC*, 426  
*Sheppard v. Maxwell*, 274–275, 285–286, 291  
*Shoen v. Shoen*, 306  
*Shulman v. Group W Productions*, 205  
*Simon & Schuster v. Crime Victims Board*, 52–53  
*Skywalker Records v. Navarro*, 49  
*Smith v. Daily Mail Publishing Co.*, 219, 295  
*Snyder v. Ringgold*, 264  
*Sony Corp. of America v. Universal City Studios, Inc.*, 349–351  
*Sony v. Universal Studios*, 360–361  
*Stanley v. Georgia*, 465  
*State v. Henry*, 462  
*State v. Walden Book Co.*, 457  
*Stratton Oakmont, Inc. v. Prodigy Services Co.*, 166
- Tasini v. New York Times Co.*, 339  
*Taus v. Loftus*, 210–211  
*Texas v. Johnson*, 45, 68–69  
*Time Warner Entertainment Co. v. FCC*, 408  
*Time, Inc. v. Hill*, 203  
*Tinker v. Des Moines Indep. Community School Dist.*, 66  
*Turner Broadcasting System v. FCC (Turner I)*, 434–435, 440
- United States v. Nixon*, 249  
*United States v. O'Brien*, 68, 434  
*United States v. Playboy Entertainment Group, Inc.*, 483  
*United States v. Progressive, Inc.*, 96  
*United States v. Smith*, 306  
*U.S. Department of Justice v. Reporter's Committee for Freedom of the Press*, 250  
*U.S. v. Williams*, 460
- Valentine v. Chrestensen*, 492  
*Vance v. Universal Amusement Co.*, 466–467  
*Viacom International v. YouTube*, 359  
*Victoria's Secret Stores v. Artco Equipment Co.*, 371  
*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 11, 493
- Walt Disney Productions, Inc. v. Shannon*, 105  
*Weirum v. RKO General, Inc.*, 104  
*White v. Samsung Electronics*, 185  
*Whitney v. California*, 90  
*Wilson v. Layne*, 234
- Yates v. United States*, 91
- Zamora v. Columbia Broadcasting System*, 102–103  
*Zeran v. America Online, Inc.*, 167  
*Zurcher v. Stanford Daily*, 313

# Subject Index

- Absolutists, 59–60
- Abuse of process, 163
- Access, 230–265
  - to accident, crime, and disaster scenes, 237–238
  - in copyright infringement, 334–337
  - discriminatory access practices, 239
  - federal Sunshine Act of 1976, 243
  - First Amendment rights and, 231–232
  - to government proceedings, 239–245
  - to government property, 238–239
  - to government records, 245–263
  - and information, 230–265
  - to jails and prisons, 239
  - to justice system proceedings, 285–302
  - to PEG channels, 437
  - to places, 230–239
  - to polling places, 238
  - press passes, 264–265
  - selective access by government, 263–265
  - trespass on private property, 230–237
  - see also* Criminal trials; Freedom of Information Act (FOIA); Government proceedings; Government records; State pen meeting laws; Trespass
- Accident scenes, 237–238
- Actual damages, 154
- Actual malice, 141–145, 203
- Administrative agencies, 31
- Administrative discretion in Freedom of Information Act (FOIA), 258–259
- Administrative law, 7–9
  - administrative regulations, 7–8
  - finding regulations, 8–9
- Administrative proceedings (hearings), 31
- Advertising, 489–534
  - alcoholic beverages, 499–501
  - in appropriation of name or likeness, 179–190
  - casino advertising, 501
  - Caveat emptor* (“Let the buyer beware”), 491–492
  - for disfavored products, 498–503
  - Federal Cigarette Labeling and Advertising Act, 503
  - harm through, 110–113
  - implied representation, 508–510
  - liability for illegal ads, 531
  - in the professions, 494
  - rates in political broadcasting, 422–423
  - right to refuse advertising, 531–532
  - required disclosures, 503
  - state laws, 492
  - tobacco products, 502–503
  - truthful commercial speech, 67, 498
  - see also* Commercial speech; Deceptive advertising; Federal Trade Commission
- Adoption of first Amendment, 41–42
- Age Discrimination and Employment Act, 409
- Agency-generated documents, 246
- Airline Deregulation Act of 1978, 526
- Alcoholic beverage advertising, 499–501
- All-purpose public figures, 149
- Alliance for Better Campaigns, 424
- Allocating radio frequencies, 380–381, 389–390
- AM radio, 389
- Alternative measures, 280
- American Bar Association
  - fair trial standards, 278
  - and FTC, 504–505
  - Model Rules of Professional Conduct*, 284
  - Reardon Report*, 278
- American Civil Liberties Union, 251, 485, 486
- American Society of Composers, Authors and Publishers (ASCAP), 342
- American Society of Newspaper Editors, 173
- Anonymous pamphleteering, 56–57
- An American Tragedy* (Theodore Dreiser), 451
- Anonymous postings in cyber-libel, 169–170
- Answer in pretrial procedure, 26
- Anti-abortion activists, 108
- Anticybersquatting Consumer Protection Act (ACPA), 371
- Antidiscrimination laws, 531
- Antimonopoly laws, 531
- Anti-SLAPP statutes, 163–164
- Antitrust violations, 532
- Appellate court
  - federal Courts, 16–17
  - procedure in, 29–31
  - state courts, 20–21
- Applicable fault standard, 14
- Application of the principle, 132–134
- Appropriation of name or likeness, 178, 179–190
  - in advertising, 180
  - commercial use, 180–181
  - consent, 186–189
  - corporate public relations publications, 181
  - deceased celebrities, 189
  - determining, 190
  - and first Amendment clash, 189–190
  - incidental uses, 182–183
  - knowing consent, 187
  - magazines and Books, 181–182
  - misappropriation, 179
  - model releases or photo consent forms, 186
  - name or likeness concept, 184–185
  - news content, 180, 182
  - news promos, 183–184
  - right of publicity, 179
  - working with models, 188
  - see also* Privacy
- Areopagitica* (Milton), 36
- Arraignment in pretrial procedure, 27
- Art museum exhibits, 448
- Ascertainment (community study) in broadcast licensing, 393
- Atomic Energy Act, 96
- Attorney General’s Commission on Pornography, 449, 453
- Attacking obscenity, 460–467
  - federal statutes, 462–464
  - knowledge requirement, 464–465
  - prior restraint, 465–467
  - private possession, 465
  - state statutes, 460–462
- Attribution requirements, 56–57
- Auction solution in broadcast licensing, 396
- Balanced Budget Act of 1997, 396
- Balancing approach, 63–67
  - compelling interest, 64
  - intermediate scrutiny, 67–69
  - preferred position balancing, 64
  - standard of judicial review, 64
  - strict scrutiny, 64, 67
- Band allotment, 389
- Battlefront access, 97
- Bench/bar/media committees, 270
- Berne Convention for the Protection of Literary and Artistic Property, 24, 321, 346

- Berne Convention Implementation Act of 1988, 321
- Bill of Rights, 5, 41, 43  
not absolute, 59–60  
and impartial jury, 271  
*see also* U.S. Constitution
- Billboards, 491
- Bipartisan Campaign Reform Act (BCRA), 81
- Birth control methods, 74
- Black, Justices Hugo, 59
- Blackmun, Justice Harry, 312, 493–494
- Bona fide news exemptions in political broadcasting, 417–419
- Brandeis, Justice Louis, 90, 92, 178, 190
- Breach of contract, 13, 51, 312, 491
- Brennan, Justice William  
*Bantam Books v. Sullivan*, 50  
*City of Renton v. Playtime Theatres, Inc.*, 469  
*Gertz v. Robert Welch, Inc.*, 145  
*Globe Newspaper Co. v. Superior Court*, 287  
*Harper & Row Publishers v. National Enterprises*, 351  
*Hustler Magazine v. Falwell*, 214–216  
licensing schemes, 49  
*Metro Broadcasting, Inc. v. FCC*, 396–398  
*New York Times Co. v. Sullivan*, 138–141, 150, 216  
*Paris Adult Theatre I v. Slaton*, 452, 453  
Pentagon papers case, 94–96  
*Rosenbloom v. Metromedia, Inc.*, 145, 150  
*Roth v. United States*, 451, 452, 453  
*Texas v. Johnson*, 45, 68–69
- Blanket licenses, 342
- Borat cases, 188–189
- Branzburg plurality, 304
- Broadcast content control, 414–444, 473–482  
children's television, 402, 427, 428–429  
and political speech, 414–416  
corollary rules, 425–426  
direct broadcast satellite (DBS), 442  
fairness doctrine, 424–427  
hoaxes, 430–431  
indecentcy, 432  
personal attack rule, 425  
political broadcasting, 414–424  
program ratings and v-chip, 432–433  
satellite carry-one, carry-all rule, 443  
Satellite Home Viewer Improvement Act of 1999 (SHVIA), 443  
sponsor ID, 429–430  
Syracuse Peace Council decision, 425  
*see also* Cable television controls; Political broadcasting
- Broadcast licensing, 377–411  
allocating radio frequencies, 380–381, 389–390  
ascertainment (community study) in broadcast licensing, 393  
auction solution, 396  
broadcasting, defined, 379  
cable franchising, 407–409  
Cable Television Consumer Protection and Competition Act of 1992, 408  
censorship prohibition, 383  
communications act of 1934, 381–382, 383, 385, 391, 404, 480  
comparative proceedings, 394–395  
competing applications, 394–395  
content controls, 378–379, 400  
controlling electronic media, 377–379  
deregulation, 403  
equal employment opportunity (EEO) rules, 391, 409–411, 416–421  
forfeitures, 401  
initial license, 392–398  
license renewals, 398–402  
limited first Amendment status, 382–388  
minority ownership, 396–398  
ownership limitations, 403–407  
ownership rules, 404–407  
Personal Attack Rule, 384  
Political Editorial Rule, 384  
and political speech, 414–429  
print media and, 378, 382  
programming, 402  
programming diversity, 402  
public inspection file, 399  
Radio Act of 1927, 380, 416  
radio spectrum, 379–382, 388–390, 407, 416  
renewal expectancy, 401–402  
scarcity rationale, 383–384, 407, 414–415  
station identification and call signs, 393  
station licensing, 391–411  
Telecommunications Act of 1996, 379, 382, 396, 398–399, 401, 403, 404, 405, 407, 412, 432, 437, 485  
transfer of licenses, 402–403  
*see also* Broadcast content controls; Federal Communications Commission
- Burden of proof, 12  
in defamation, 121, 129–130
- Burger, Chief Justice Warren  
*CBS, Inc. v. FCC*, 421–422  
*Chandler v. Florida*, 291, 296–297  
*Houchins v. KQED, Inc.*, 239  
*Miami Herald Co. v. Tornillo*, 55  
*Nebraska Press Association v. Stuart*, 272, 279–280, 291  
on news-gathering process, 231–232  
on obscene material, 60, 62  
*Paris Adult Theatre I v. Slaton*, 452  
*Press-Enterprise Co. v. Superior Court or Press-Enterprise II*, 288–289  
*Richmond Newspapers, Inc. v. Virginia*, 286
- Bush, George H., 46
- Bush, George W., 270, 387, 448, 505
- Businesses in libel cases, 123–124
- Cable Communications Policy Act of 1984, 436
- Cable franchising, 407–409  
National audience limits, 408–409  
Cable pay-per-view, 448
- Cable News Network (CNN), 234, 282
- Cable Television Consumer Protection and Competition Act of 1992, 344, 408, 437
- Cable television control, 433–444  
access or PEG rule, 421–424  
cable acts, 436–437  
Cable Communications Policy Act of 1984, 436  
Cable Television Consumer Protection and Competition Act of 1992, 344, 408, 437  
Cable News Network (CNN), 234, 282  
content based restrictions, 441–444  
First Amendment status, 434–436  
indecentcy, 442, 478, 481–483  
indecent material versus obscene material, 437–439  
must-carry law, 439–441  
network non-duplication rule, 442  
programming in, 482–483  
retransmission consent, 441  
retransmissions in copyright infringement, 343–345  
Syndicated program exclusivity rule (syndex), 44  
Telecommunications Act of 1996, 437  
Turner I, 434–435  
Turner II, 440–441  
*see also* Broadcast content controls
- California First Amendment coalition, 292
- Call signs, 393
- Cameras in the courtroom, 295–298
- Campaign reforms and First Amendment, 78–79
- CAN-SPAM (Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2004), 528
- Candidate access rule in political broadcasting, 421–424
- Carter, Jimmy, 421
- Case law, 9–12  
common law, 9  
court reports, 11  
finding cases, 11–12  
historical development, 9–10  
parallel citations, 12  
role of precedent, 10–11
- Case of Kobe, 282–283
- Casino advertising, 501
- CATV (community antenna television), 433
- Cease-and-desist orders in deceptive advertising, 506, 508, 519
- Case-by-case scrutiny of closures, 287–288
- Censorship, 36, 86–88  
prohibition in broadcast licensing, 383  
and risks to public safety, 86–88  
of the student press, 70–74  
*see also* Freedom of the press
- Centralized government, 15, 41
- Certiorari, writ of, 30, 498
- C.F.R. (*Code of Federal Regulations*), 9, 479
- Chafee, Zechariah, *Free Speech in the United States*, 63
- Change of venue, 273
- Channel assignment, 389
- Character assassination, 130
- Child Online Protection Act, 485–487

- Child pornography, 459–460
- Child Pornography Prevention Act of 1996, 459
- Child violence, 101
- Children's Online Privacy Protection Act (COPPA), 225, 530
- Children's television, 427
- Children's Television Act of 1990, 427
- CIA employees, 83
- Civil cases
  - discovery, 293
  - gag orders and, 280–282
  - pretrial procedure, 26–27
- Civil defendants, rights of, 27
- Civil disobedience, 86
- Civil law and criminal law, 12–13
- Civil penalties for deceptive advertising, 520
- Civil proceedings access, 292–293
- Civil Rights Act of 1964, 409
- Civil rights activists, 138
- Civil rights laws, 204
- Clark, Justice Tom, 273–274, 275
- Class action, 525
- Clear-and-present-danger standard, 88, 93, 100, 110
- Closed courtrooms, 286
- Code of Federal Regulations* (C.F.R.), 9, 479
- Codes, statutory law, 6–7
- Collaboration agreements in copyrights, 329
- Collective works in copyrights, 324
- Commerce, trademarks use in, 363
- Commercial databases, 12
- Commercial limits in children's television, 427–428
- Change of plaintiffs' status, 151–152
- Change of venue, 273, 280
- Channel assignment, 389
- Children's Advertising Review Unit Council (CARU), 531
- Children's Online Privacy Protection Act (COPPA), 225, 530
- Citizens for Community Values (CCV), 472
- Civil and criminal penalties, 520
- Civil disobedience, 86
- Clear-and-present-danger test on freedom of speech, 89
- Collaboration agreements, 329
- Collective works, 324
- Colorado Open Records Act, 265
- Commercial speech, 489–532
  - background and definition, 491–492+
  - and the first Amendment, 492–503
  - rise to protection, 492–494
  - central Hudson test, 494–496
  - four-part analysis, 495
  - defining, 491, 496–498
  - see also* Advertising; Deceptive advertising; Federal Trade Commission
- Commercial use of name or likeness, 179–190
- Commercials defined, 427
- Commission on Freedom of the Press, *Free and Responsible Press*, A, 54
- Common carriers and conduits
  - tort liability, 166
- Common law, 9
- Common law privileges, 131, 157
- Communications Act of 1934, 391–382, 383, 385, 391, 404, 480
- Communications Decency Act (CDA) of 1996, 167
- Communications industries, 1
  - First Amendment and, 36
- Community antenna television (CATV), 433
- Communications law, 3
  - general tort and contract principles, 14
- Community for Creative Non-Violence (CCNV), 327
- Community property states, 3293
- Comparative proceedings in broadcast licensing, 394–395
- Compelled financial support, 55–56
- Compelled speech, 54–57
- Compelling interest, 64
- Compensatory damages, 154
- Competing applications in broadcast licensing, 394–395, 401
- Compilations in copyrights, 323–324
- Complaint in pretrial procedure, 26
- Compulsory licensing in copyrights, 344
- Comstock Act, 451
- Concurring opinions in the U.S. Supreme Court, 30
- Conduct versus expression, 44–46, 67
- Confidential sources, 270
  - forced disclosure of, 302, 308
- Confidentiality expectations, 311–312
- Confiscation in trespass, 236–237
- Conflict resolution, First Amendment, 59–69
- Congressional sessions, 244
- Consent
  - in appropriation of names or likeness, 186–189
  - express or implied, 232–233
  - knowing, 187
  - model releases or photo consent forms, 186
- Companion torts, 212–218
  - fraud, 213–214
  - emotional distress, 214–217
  - trespass, 217–218
- Confiscation of media property, 236–237
- Constitutional law, 4–6
  - finding constitution, 6
  - judicial review, 6
  - state constitution, 5–6
  - U.S. constitution, 5
  - see also* Constitutions; First Amendment
- Constitutional malice, 141–145
- Constitutional rights of criminal defendants, 27
- Constitutions
  - defined, 4
  - see also* Constitutional law
- Consumerism, 491
- Contempt citations by courts, and First Amendment, 51
- Constitutional tremor, 243
- Contempt of court, 313–315
- Content control
  - in broadcast licensing, 378, 379, 400–401
  - in cable television, 405
  - see also* Broadcast content
- Content-neutral in TPM restrictions, 573
- Contested applications in broadcast licensing, 393–394
- Continuance as alternative to gag order, 280
- Contracts and torts, 13–14
- Contractual limits on access, 235
- Contributory infringement, 359
  - inducement theory of, 361
- Controlling electronic media, 414–416
  - see also* Broadcast licensing
- Controlling the Assault of Non-Solicited Pornography and Marketing (CANSPPAM) Act of 2004, 528
- Controls on free expression, 414–416
- Controls on nonobscene material, 467–473
- Coolidge, Calvin, 380
- COPPA. *See* Children's Online Privacy Protection Act
- Copyright Act of 1909, 330
- Copyright Act of 1976, 320, 321
- Copyright Arbitration Royalty Panels, 345
- Copyright laws, 7, 16
- Copyright Royalty and Distribution Reform Act of 2004, 345
- Copyright Term Extension Act (1998), 321
- Copyrights, 320–347
  - access in infringement, 334–337
  - background and history, 320–321
  - Berne Convention for the Protection of Literary and Artistic Property, 321, 346
  - Berne Convention Implementation Act of 1988, 321
  - cable retransmission, 343–345
  - Cable Television Consumer Protection and Competition Act of 1992, 344
  - collaboration agreements, 329
  - collective works, 324
  - compilations, 323–324
  - compulsory licensing, 344
  - Copyright Act of 1909, 330
  - Copyright Act of 1976, 320, 321
  - Copyright Arbitration Royalty Panels, 345
  - Copyright laws, 7, 16
  - Copyright Royalty and Distribution Reform Act of 2004, 345
  - Copyright Term Extension Act (1998), 321
  - in cyberspace, 355–361
  - defined, 320
  - derivative work, 325
  - determining what is copyrightable, 325
  - Digital Millennium Copyright Act (1998), 321–357
  - duration of ownership, 330–332
  - duration terms, 331–332
  - electronic rights, 339–340
  - enforcement, 336–337
  - expression, 321–322
  - tangible medium, 325
  - government works, 329–330
  - infringement of, 334–337, 345
  - international protection, 345–347
  - internet issues, 355–361

- Copyrights (*Continued*)  
 joint authorship, 328–329  
 licensing agreements, 337–340  
 moral rights, 332–333  
 “original works of authorship, 321  
 originality, 322–325  
 ownership, 326–333  
 parody, 354–355  
 protected works, 321–326  
 public domain, 330  
 registration and notice, 333–334  
 requirements for, 325  
 Satellite Home Viewer Act of 1988, 344  
 Sonny Bono Copyright Term Extension Act (1998), 330  
 statutory damages, 336  
 substantial similarity, 335–336  
 Universal Copyright Convention (UCC), 346  
 work made for hire, 327–328  
*see also* Fair use doctrine; Intellectual property; Internet and copyrights; Licensing agreements in copyrights
- Core children’s programming, 428
- Corollary rules, 425–426
- Corporate securities, 75, 76
- Corporate speech, 74–82  
 campaign reforms and First Amendment, 74–82  
 corporate contribution and expenditure rights, 79  
 ideological corporations, 80  
 Political Action Committee (PAC), 80  
 political contributions versus independent expenditures, 78  
 protecting investment markets, 75–77  
 protecting the political process, 77–82  
 courts weigh in FECA limitations, 79–80  
 on public issues, 80–81  
 SEC Rule 10b-5, 75–76
- Corporations, 124  
 contribution and expenditure rights, 79  
 public figures, 148, 149–150  
 public relations publications, 181
- Corrective advertising, 519
- Court injunctions, 519–520  
 in deceptive advertising, 519  
 prohibiting publication, 48–49
- Courtroom access rights, 286–287
- Courtrooms, closed, 285
- Courts of equity, 9
- Creative property. *See* Intellectual property
- Crime scenes, 237–238
- Crime Victims Board, 52–53
- Crimes versus torts, defamation cases, 120
- Criminal defendants  
 as public figures, 148, 149–151  
 rights of, 27, 310
- Criminal harassment, 212
- Criminal law, 7  
 and civil law, 12–13
- Court systems and jurisdiction, 14–25
- Creative property, 318–373
- Criminal penalties for deceptive advertising, 218–222
- and electronic surveillance, 223
- and First Amendment, 51
- and privacy, 178
- in privacy, 204, 207, 218–221
- Criminal trespass, 236
- Criminal trials, 286–290  
 access to, 286–290  
 pretrial proceedings, 26, 282, 290–291  
 jury selection phase, 288–290  
 courtroom access rights, 286–288
- Custom and usage in trespass, 232
- “Cyber-libel,” 165–171  
*see also* Internet
- Cyberspace, 21–25  
*see also* Internet
- Damage, 235–236  
 awarding, 154  
 in libel cases, 154  
 limits on, 155  
 to reputation, 116–173  
 in trial procedure, 29  
 in trespass, 235–236
- Data collection (spyware), Internet, 224–225
- Death threats, 109
- Debates in political broadcasting, 419
- Deceased celebrities, 189
- Deceptive advertising, 40, 60, 507–512  
 cease-and-desist orders in, 506, 508, 519  
 civil and criminal penalties, 520  
 corrective advertising, 519  
 court injunctions, 519–520  
 and Federal Trade Commission, 492  
 FTC enforcement devices in, 519–520  
 Internet, 527–528,  
 Lanham act lawsuits, 520–523  
 likely to mislead reasonable consumers, 510–511  
 material representation, 511  
 prior substantiation doctrine, 513–515  
 puffery, or puffing, 510  
 representation or omission, 508–510  
*see also* Advertising; Commercial speech; Federal Trade Commission
- Deceptive pricing in advertising, 515–516
- Defamation  
 burden of proof, 121, 129–130  
 categorizing plaintiff, 147–153  
 Communications Decency Act (CDA) of 1996, 167  
 crimes and torts, 120  
 in cyberspace, 165–171  
 defamatory content, 121–129  
 defined, 121–124  
 English common law, 119  
 evolution of law, 116–121  
 fabricated quotes, 142, 150  
 fact versus opinion, 131  
 fair comment privilege, 131  
 and false light, 200–203  
 falsity of statements, 129–134  
 fault on the part of communicator (actual malice or negligence), 137–153  
 group defamation, 136–137  
 harm to plaintiffs, 153–156  
 headlines and, 125–126  
 identification of plaintiff, 136–137  
 on the internet, 165–171  
 interpreting defamatory statements, 124–129  
 ISP liability, 166–169  
 libel by implication, 126–128  
 libel lawsuit elements, 121  
 libel reform efforts, 171–173  
 libel tourism, 170–171  
 libel versus slander, 119–120  
 living persons and businesses, 123–124  
 media cases, 118  
 negligence standard, 111–112, 145–147  
 private defendants, 155–156  
 protected opinion, 131–132  
 protections for defendants, 156–165  
 proving falsity in libel, 130, 131, 132  
 public and private concern in libel, 150  
 publication (dissemination) to third parties, 135  
 reasonable care, 146–147  
 reckless disregard, 143–145  
 scope of protected opinion, 131–132  
 summary judgment in public person libel cases, 162–163  
 thoughts, not mere words, 128–129  
 threat to reputation, 122–123  
 tort liability for communicators, 166  
 Uniform Correction or Clarification of Defamation Act (UCCDA), 172  
 user liability, 169–170  
 U.S. Supreme cases on libel law, 121, 150  
 “words of warning,” 123  
*see also* Internet; Libel; Protections for defendants in libel cases
- Defendant  
 in pretrial procedure, 26  
*see also* Protections for defendants in libel cases
- Democracy  
 and freedom of speech, 37–38  
 open meeting laws, 239  
 and secrets, 93  
 states as laboratories for, 19
- Deportation hearings, 293–294
- Deregulation in broadcast licensing, 403
- Derivative work in copyrights, 325
- Dickinson rule, 314
- Digital Millennium Copyright Act (DMCA), 357
- Dilution of trademarks, 367–368
- Direct Broadcast Satellite (DBS), 442
- Disaster scenes, 237–238
- Disclosure of media information. *See* Forced disclosure of media information and sources
- Disclosure exemptions, 247–252
- Disclosure of private facts, 190–200  
 highly offensive disclosure, 193–194  
 news worthiness defense, 194–200  
 private life, 191–193
- Discovery in pretrial procedure, 26
- Discriminatory access practices, 239

- Disfavored product advertising bans, 498–503
- Disguises, 208
- Dissenting opinions in the U.S. Supreme Court, 30
- Distinctiveness of trademarks, 364–365
- Distortion in false light situations, 201–203
  - see also* False light
- Distributing information, 46–47
- Distributor tort liability, 166
- Diversity-of-citizenship and federal jurisdiction, 16
- Doctrine against prior restraint, 61
- Doctrine of incorporation, 43
- Doctrine of judicial review, 6
- Doctrine of overbreadth, 62
- Doctrine of precedent, 10–11
- Doctrine of prior restraint, 47,
- Doctrine of prior restraint, 36, 47–50, 61, 270, 279, 465–466
- Doctrine of sovereign immunity, 20
- Doctrine of void-for-vagueness, 63
- Domain names and trademarks, 369–371
- Douglas, Justice William O., 59–60, 95
- Drudge, Matt, 23
- Dual copyrights (musical composition and sound recordings) in music licensing, 340, 343
- Dual Network Rule, 407
- Due care, 100
- Due process clause, 263
  - Fifth Amendment, 62, 263
  - Fourteenth Amendment, 62, 271
  - Sixth Amendment, 303
- Dueling, 118
- Duration of ownership in copyrights, 330–332
- Duration terms in copyrights, 332
- E-commerce, 225
- E-mail, 165, 169
- E-mail privacy, 222–227
- Economic effect in fair use doctrine, 348–349
- Educational and informational programming defined, 428
- EEO rules. *See* Equal employment opportunity (EEO) rules
- Electronic bulletin boards, 167–168, 372
- Early American obscenity law, 450–451
- Electronic Communications Privacy Act of 1986 (ECPA), 220, 223
- Electronic Freedom of Information Act Amendments (EFOIAA) of 1996, 257–258
- Electronic media. *See* Broadcast content; Broadcast licensing
- Electronic media controls, 414–416
- Electronic recording equipment, 208
- Electronic rights in copyrights, 339–340
- Electronic simultaneous multiple-round auctions, 396
- Embellishment in false light situations, 201–202
  - see also* False light
- Elmer Gantry (Sinclair Lewis), 451
- Emergency Broadcasting System, 431
- Endorsements in advertising, 516–519
- Enforcement in copyright infringement, 336–337
- “Enforcement Policies Regarding Broadcast Indecency” (FCC), 478
- Enforcement Policy Statement on Food Advertising, 505
- England
  - common law evolution, 9–10
  - court of the star chamber, 118, 270
  - defamation, 119
  - freedom of speech, 37
  - freedom of the press, 40
  - license system in, 48
- Entertainment, First Amendment in, 45
- Entertainment and sporting events
  - proprietary control, 235
- Environmental Protection Agency, 8
- Equal employment opportunity (EEO) rules, 391, 409–411
- Equal opportunities rule in political broadcasting, 416–421
- Equal Pay Act, 409
- Equal protection clause, Fourteenth Amendment, 263
- Equitable remedies in trial procedure, 29
- Espionage act of 1917, 89, 90
- Ethical concerns
  - of court coverage, 299
  - in forced disclosure of media information and sources, 311
  - in newsworthiness defense standard, 199
- Ethnic groups, 136
- European Union, 24, 332
- Exclusive rights, 356–357
- Exclusive versus concurrent jurisdiction in federal jurisdiction, 15–16
- Executions, 291–292
  - First Amendment right of access to witness, 239
- Executive privilege, 249
- Executive sessions of meetings, 241
- Expectation of privacy, 204–206
- Expenditure rights in corporate contribution, 79
- Express consent, 232–233
- Expression in copyrights, 321–322
- Expression versus conduct, 44–46
- Expressive conduct, 45, 68
- Externally produced news video, 353
- Evolution of defamation law, 116–121
- F. (*Federal Reporter, The*), 19
- Fact versus opinion, 131
- Fair comment privilege, 131
- Fair report or public record privilege, 157
- Fair trials, 270–278
  - American Bar Association standards, 278
  - change of venue, 273
  - closed courtrooms, 286
  - confession film, 274
  - effect of publicity on, 276–277
  - First Amendment conflict, 272, 285
  - history of trial by jury, 270–271
  - media publicity, 274–275, 277, 278, 286, 291
  - pretrial publicity and trial publicity, 272
  - Sixth Amendment guarantee, 271
  - U.S. Supreme Court warnings, 272–276
  - Warren Commission Report, 275–276
  - see also* Justice system; Media; Trials
- Fair use doctrine, 347–355
  - applying the factors, 348–349
  - cases, 349–353
  - economic effect, 348–349
  - nature of copyrighted work, 348
  - portion of work used, 348
  - purpose and character of use, 348
  - see also* Copyrights; Intellectual property
- Fairness doctrine, 424–425
- False advertising, 21, 60, 62
- False light, 179, 200–203
  - and defamation, 200
  - determining, 203
  - distortion, embellishment, and fictionalization, 201–202
  - elements and privileges, 203
  - situations, 201–203
- False pretenses, 208
- Falsity of statements, 129–134
- Fault on the part of communicator (actual malice or negligence), 137–153
- FCC. *See* Federal Communications Commission
- FCC Record, 391
- FECA. *See* Federal Election Campaign Act
- Federal Administrative Procedure Act, 390
- Federal Bureau of Investigation (FBI), 250
- Federal Cigarette Labeling and Advertising, 503, 526
- Federal circuit court, 17
- Federal Communications Commission (FCC), 8, 244, 388–391
  - adjudication, 390–391
  - and indecency, 473
  - jurisdiction and powers, 388–390
  - organization and structure, 388
  - practice and procedure, 390–391
  - public interest philosophy, 402
  - rule making, 390
  - spectrum allocation, 389
  - station licensing, 391–411
  - taping telephone conversations for broadcasting, 220–221
  - web privacy, 225
  - see also* Broadcast licensing
- Federal Courts, 16–17, 20
  - court reports, 11
  - see also* Federal jurisdiction
- Federal Election Campaign Act (FECA), 78
- Federal jurisdiction, 15–19
  - diversity-of-citizenship, 16
  - exclusive versus concurrent, 15–16
  - federal courts, 16–17
  - precedent application, 17–19
  - see also* Federal courts
- Federal Radio Commission, 380, 382, 416, 424



- Federal Register*, 244, 390  
*F. (Federal Reporter, The)*, 19  
 Federal statutes, 95  
   on obscenity and indecency, 462–464  
 Federal Sunshine Act of 1976, 243  
*Federal Supplement (F.Supp.)*, 19  
 Federal Trade Commission, 8, 244, 388,  
   503–520  
   authority of, 504–507  
   and deceptive advertising, 492  
   deceptive pricing in advertising, 515–516  
   endorsements in advertising, 516–519  
   Enforcement Policy Statement on Food  
     Advertising, 505  
   Federal Trade Commission Improvement  
     Act of 1975, 505  
   guarantees and warranties in  
     advertising, 516  
   industry guides, 515  
   Internet deception, 527–528  
   jurisdiction, 507  
   “Operation Waistline” and “Project  
     Workout,” 505  
   prior substantiation doctrine, 513–515  
   procedures, 506  
   regulatory aggressiveness, 504–506  
   rules and guides for advertising, 515–519  
   trade regulation rules, 515  
   web privacy and spyware, 224, 506  
   *see also* Advertising; Commercial  
     Deceptive advertising  
 Federal Trade Commission Improvement Act  
   of 1975, 505  
 Federal Trademark Dilution Act of 1995, 367  
 Federal Wiretap Act of 1968, 220, 221  
 Federalism, 3  
 Federalist Papers, 57  
 Fictional literary characters, 322  
 Fictionalization in false light situations,  
   201–202  
   *see also* False light  
 Fifth Amendment, due process clause, 62,  
   263  
 “Fighting words,” 65  
 “Filthy Words” monologue, 474, 478,  
   481, 483  
 Financial burdens, First Amendment and,  
   52–54  
 Filing requests under the FOIA, 252–254  
 First Amendment, 5, 6, 34–85  
   absolutists, 59–60  
   adoption of, 41–42  
   application of, 61  
   attribution requirements, 56–57  
   balancing approach, 63–67  
   balancing tests for forced disclosure of  
     media information, 303–308  
     and broadcast licensing, 382–388  
     in cable television controls, 433–434  
     campaign reforms, 78–79  
     censorship, 36, 47  
     compelled financial support, 55–56  
     compelled speech, 54–57  
     conflict in fair trials, 272, 285  
     conflict resolution, 59–69  
     content-neutral test, 58  
     corporate speech, 74–82  
     court injunctions prohibiting publication,  
       47–48  
     and doctrine of incorporation, 43  
     entertainment, 45  
     Espionage Act, 89, 90  
     expression versus conduct, 44–46  
     expressive conduct, 45  
     financial burdens, 52–54  
     flag burning, 46  
     and forced disclosure of media information  
       and sources, 303–308  
     forum theory, 69–70  
     and Fourteenth Amendment, 43  
     and freedom of speech, 38–41  
     government facilities and media, 69–74  
     history of free speech, 34–38  
     and impartial trials, 270–278  
     informal coercion and, 49–50  
     intermediate scrutiny, 67–69  
     interpretation of, 59–69  
     liberty versus government power, 43–44  
     licensing, 36, 37, 48–49  
     limitations to protections, 60  
     media access laws, 54–55  
     minimum scrutiny, 62  
     and National security, 93–99  
     nature of the guarantee of, 43–47  
     and obscenity, 448  
     overbreadth and vagueness, 62–63  
     prior restraints, 47–50  
     protecting investment markets, 75–77  
     protecting the political process, 77–82  
     punishment after the fact or subsequent  
       sanctions, 50–52  
     rebuttal, 40–41  
     reporter’s privilege, 303, 305, 307  
     rights not absolute, 59–60  
     resolving conflicts, 59–69  
     sedition act, 88  
     seditious libel, 37  
     Smith Act of 1939, 90–91  
     state action and, 44  
     strict scrutiny, 64, 67  
     student press, 70–74  
     Supreme Court rulings on, 18  
     suspect restrictions, 47–59  
     symbolic speech, 45  
     taxes, 53–54  
     Time, place, and manner (TPM)  
       restrictions, 57–59  
     unprotected speech, 60, 62  
     Waiver of free speech rights, 82–83  
     Yahoo!’s rights of free expression, 24  
     *see also* Freedom of speech; U.S. Supreme  
       Court First Amendment cases  
 Fixation in copyrights, 325  
 Flag burning, 46  
 Flag Protection Act, 46  
 FM radio, 389  
 FOIA. *See* Freedom of Information Act  
 Food, Drug, and Cosmetic Act, 503  
 Forced disclosure of media information and  
   sources, 302–313  
   balancing tests for, 303–308  
   confidential information and sources, 302,  
     309–310  
   confidentiality expectations, 311–312  
   contempt of court, 313–315  
   ethical concerns, 311  
   and the first Amendment, 303–308  
   legal obligation to sources, 311–312  
   media defendants, 310  
   police searches, 313  
   protection against subpoenas, 302  
   Reporters Committee for Freedom of the  
     Press, 252  
   reporter’s privilege (First Amendment),  
     303, 305, 307  
   search warrants, 313  
   and the Sixth Amendment, 309–310  
   state shield laws, 308–310  
   subpoenas, 302, 309  
 Ford, Gerald, 247, 351  
 Forfeiture letters, 463, 479–480  
 Forfeitures in broadcast licensing, 401  
 Forum theory, 69–70  
 Fourteenth Amendment  
   adoption of, 41–42  
   equal protection clause, 263  
   and doctrine of incorporation, 42  
   due process clause, 263  
   and First Amendment, 43  
 Fourth Amendment, 5, 264  
   search warrant violations, 233  
 Fraud and privacy, 213–214  
 Free air time in political broadcasting,  
   423–424  
*Free and Responsible Press, A* (Commission on  
   Freedom of the Press), 54–55  
*Free Speech and Its Relation to Self-  
   Government* (Meiklejohn), 59  
*Free Speech in the United States* (Chafee),  
   63–64  
 Freedom of Information Act (FOIA),  
   245–259  
   access to law enforcement records,  
     250–252  
   administrative discretion, 258–259  
   Electronic Freedom of Information Act  
     Amendments (EFOIAA) of 1996,  
     257–258  
   entities covered, 246  
   executive privilege, 249  
   exemptions from disclosure, 247–252  
   filing requests, 252–254  
   going to court, 254–257  
   records covered, 246  
   *see also* Access; Government records; State  
     open records laws  
 Freedom of Information Award, Society of  
   Professional Journalists, 286  
 Freedom of speech, 14  
   balancing approach, 63–67  
   compelled speech, 54–57  
   corporate speech, 74–82

- in England, 37
- expression versus conduct, 44–46
- expressive conduct, 45
- FCC and, 381
- and First Amendment, 38–41
- gagging trial participants, 283–285
- gathering and distributing information, 46–47
- history of, 34–38
- individualistic reasons for, 39–40
- and national security, 93–99
- natural law, 40
- racist or sexist speech prohibitions, 51
- reasons for, 38–41
- Sedition Act, 88
- social reasons, 38–39
- social stability, 39
- symbolic speech, 45
- unprotected speech, 60, 62
- waiver of free speech rights, 82–83
- see also* First Amendment
- Freedom of the press, 36–37, 40, 250
  - in Civil War, 88
  - in the Constitution, 41
  - in England, 36, 40
  - expression versus conduct, 44–46
  - media access laws, 54–55
  - and national security, 93–99
  - Pentagon Papers, 94–96
  - publication prohibitions through court injunctions, 47–48
  - Reporters Committee for Freedom of the Press, 252
  - student press, 70–74
  - see also* Fair trials; Forced disclosure of media information and sources; Freedom of Information Act (FOIA); Privacy
- Freedom of the press in England* (Siebert), 40
- Freelancers, 324, 349
- F.Supp. (*Federal Supplement*), 18
- FTC. *See* Federal Trade Commission
- Gag orders, 278–285
  - alternatives to, 280
  - lawyers' rules of conduct, 284–285
  - media as trial participants, 285
  - sample cases, 280–282
  - gagging the media, 279–283
  - as trial participants, 283–285
  - see also* Fair trials; Justice system
- Gathering and distributing information, 46–47
- Generic term and trademarks, 368
- Geographic regions, 136
- Gertz and the negligence standard, 145–146
- Ginsburg, Justice Ruth Bader, 339
- Government, centralized, 41
- Government communications, 390
- Government corruption, 39
- Government employment contracts, waiver of First Amendment rights in, 83
- Government entities and libel, 40
- Going to court, 254–257
- Government facilities and media, 69–74
  - forum theory, 69–70
  - student press, 70–74
- Government proceedings, 239–245
  - congressional sessions, 244
  - exceptions to Sunshine Act, 244–245
  - federal Sunshine Act (1976), 244–245
  - state open meeting laws, 240–243
  - federal meetings statute, 243–245
  - notice of meetings, 243
  - regulatory agencies, 244
  - remedies for violation, 245
  - see also* Access; State open meeting laws
- Government property, 238–239
- Government records, 245–263
  - Freedom of Information Act (FOIA), 245–259
  - state open records laws, 259–263
  - open records laws, 245
  - see also* Access; Freedom of Information Act (FOIA)
- Government websites, 6, 12
- Government works and copyrights, 329–330
- Grand jury in pretrial procedure, 27
- Gross negligence, 14
- Group defamation, 136–137
- Groups subject to the laws, 240
- Guarantees and warranties in advertising, 516
- Guilty beyond a reasonable doubt, 27
- H-bomb case, 96–97
- Hamilton, Alexander, 57
- Hamilton, Andrew, 37
- Harassment, criminal, 212
- Harlan, Justice John, 65–67, 95
- Harm from advice or instruction, 104–110
  - books, 106–108
  - hypothetical websites, 110
  - the Internet, 108–109
  - radio and TV, 104–105
  - recordings, 105–106
  - user-generated content, 109
- Harm through advertising, 110–113
  - soldier of fortune I, 110–111
  - soldier of fortune II, 111–113
- Harm through imitation of video broadcasts, 101–104
  - autoerotic asphyxia in *Hustler* magazine, 102
  - child violence, 101
  - stunt on *The Tonight Show*, 102
- Harm to plaintiffs in libel suits, 153–156
- Hate speech, 108
- Harsh satire and the hustler case, 214–216
- Headlines and defamation, 125–126
- Hidden cameras, 209–210
- Highly offensive disclosure standard, 193–194
- History of U.S. Decision-Making Process on Viet Nam Policy*, 93–94
- Hoaxes in broadcasting, 430–431
- Holmes, Justice Oliver Wendell, 89, 90, 128
- Hotlines, media law, 263–264
- Hughes, Chief Justice Charles, 48
- Humiliation for its own sake in newsworthiness defense standard, 195–197
- Hutchins Commission, 54
- ICANN. *See* Internet Corporation for Assigned Names and Numbers
- Identity betrayal, 218–219
- Ideological corporations, 80, 388
- Impartial jury, 271
- Imperative of Freedom, The* (Merrill), 55
- Impersonating law enforcement officers, 209
- Implied consent, 232–233
- Implied representation in advertising, 508–510
- Incitement standard, 91–93
- Incitement to violent or dangerous conduct, 62
- Incitement versus negligence, 99–100
- Incorporation doctrine, 43
- Incidental uses, 182–183
- Indecency, 473–487
  - and broadcast content controls, 432, 473–487
  - in cable TV, 441, 482–483
  - Child Online Protection Act (COPA), 485–487
  - Communications Decency Act (CDA), 485
  - defined, 448, 474
  - "Enforcement Policies Regarding Broadcast Indecency" (FCC), 478
  - Federal Communications Commission (FCC), 381
  - "Filthy Words" monologue, 474, 478, 481, 483
  - Forfeiture letters, 463, 479–480
  - "Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464" (FCC), 478
  - National Public Radio, 478
  - obscenity versus, 438, 473
  - programming in cable television, 482–483
  - safe harbor hours, 476, 487
  - Telecommunications Act, 483
  - telephone ("dial-a-porn"), 483–484
  - U.S. Justice Department, 473
  - see also* Obscenity and indecency
- Independent contractors, 327–328
- Independent expenditures versus political contributions, 78
- Indictment in pretrial procedure, 27
- Individualistic reasons for freedom of speech, 39–40
- Inducement theory of contributory copyright infringement, 361
- "Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464" (FCC), 478
- Infliction of mental distress, 13
- Industry guides, 515
- Informal coercion, 49–50

- Information-gathering process, 46–47  
and intrusion upon physical seclusion, 204
- Infringement of copyrights, 334–337, 345  
on Internet, 355–356
- Infringement of trademarks, 366–367
- Initial appearance in pretrial procedure, 27
- Initial broadcasting license, 392–398
- Injunction in trial procedure, 29
- Intellectual property, 318–373  
defined, 319–320  
unfair competition law, 371–373  
*see also* Copyrights; Trademarks
- Intensive voir dire as alternative to gag order, 280
- Intentional infliction of emotional distress, 204, 214–217
- intermediate scrutiny, 67–69
- International Court of Justice, United Nations, 24
- international jurisdiction, 23–25
- International protection of copyrights, 345–347
- International Telecommunications Union, 390
- Internet, 21–22, 182  
advertising on, 506  
copyright issues, 355–361  
data collection (spyware), 224–225  
deceptive advertising on, 507, 527–528  
defamation cases, 165–171  
Digital Millennium Copyright Act (1998), 321, 357  
electronic rights in copyrights, 339–340  
government regulation of, 225  
International Netforce, 505  
Internet service provider (ISP) liability, 166–169  
keywords, 529  
peer-to-peer piracy, 359–361  
and privacy, 222–227  
spamming (CAN-SPAM Act), 528, 530  
statutory immunity, 167–169  
traffic diversion, 529  
user liability, 169–170  
web privacy and spyware, 225, 506
- Internet and copyrights, 355–361  
consumer cases, 361  
contributory infringement, 359–360  
DMCA immunity, 357–359  
exclusive rights, 356–357  
inducement theory of contributory copyright infringement, 361  
infringements, 355–361  
MGM v. Grokster, 360–361  
Napster Case, 359–360  
Online Copyright Infringement Liability Limitation Act, 357  
peer-to-peer piracy, 359–361
- Internet Corporation for Assigned Names and Numbers (ICANN), 370
- Internet service provider (ISP), 357
- Interpretation of the First Amendment, 59–69
- Interstate commerce, 492
- Interstate jurisdiction, 22–23
- Interpreting defamatory statements, 124–129
- Interactive Advertising Bureau (IAB), 531
- intrusion upon physical seclusion, 179, 204–212  
defined, 204  
determining, 206  
disguises, false pretenses, and hidden cameras, 208  
e-mail privacy, 223  
expectation of privacy, 204–206  
information-gathering process, 204  
limits of liability, 212  
offensive standard, 206–208  
photographic and electronic recording equipment, 208  
public settings, 211–212  
subterfuge, 208–211  
and trespass, 204, 207, 208  
*see also* Privacy
- Invasion of privacy. *See* Privacy
- Inventions, 320
- Investment market protection, 74–82
- Involuntary public figures in libel cases, 151, 153
- Jails and prisons access, 239
- Jamming, 380
- Jay, John, 57
- Jefferson, Thomas, 39, 40, 88
- Jews, 426
- Johnson, Lyndon, 296
- Joint authorship in copyrights, 328–329
- Joint copyright ownership, 328–329
- Joint works, 328
- "Journalism Forum," 166
- Judges  
and equitable remedies, 29  
public criticism of, 315
- Judicial process, 25–31  
administrative proceedings, 31  
appellate procedure, 29–31  
civil case pretrial procedure, 26–27  
criminal case pretrial procedure, 27–28  
justiciable controversy, 25–26  
major steps in, 28  
trial procedure, 28–29
- Judicial review, 6  
doctrine of, 6
- juries, 27  
admonitions as alternative to gag order, 280  
alternatives to gag orders, 280  
empirical studies of performance, 277  
and equitable remedies, 29  
history of, 270–271  
impartial, 271  
selection in criminal trials, 288–290  
*see also* Trials
- Jurisdiction, 14–25  
federal, 15–19  
personal, 14, 21, 22  
subject matter, 15
- Justice system, 268–315  
access to evidence and records, 299–302  
access to proceedings, 285–302  
bench/bar/media committees, 270  
California news coverage of criminal proceedings, 300–301  
cameras in the courtroom, 295–298  
civil proceedings access, 292–293  
contempt of court, 313–315  
deportation hearings, 293–294  
ethics and etiquette of court coverage, 299  
executions, 291–292  
*Federal Rules of Criminal Procedure*, 298  
juvenile court, 294–295  
media relationship with, 268, 270  
public criticism of judges, 315  
*see also* Fair trials; Forced disclosure of media information and sources; Gag orders; Trials
- Justiciable controversy, 25–26
- Juvenile court, 294–295
- Juveniles, 218
- Justice Warren's Commission, 275–276
- Kennedy, John F., 275, 326
- Kennedy, Justice Anthony  
*Ashcroft v. Free Speech Coalition*, 459  
*Board of Regents of the University of Wisconsin v. Southworth*, 56  
*Masson v. New Yorker Magazine, Inc.*, 142  
*Turner Broadcasting System v. FCC (Turner I)*, 440  
*Turner Broadcasting System v. FCC (Turner II)*, 440  
*United States v. Playboy Entertainment Group, Inc.*, 483
- Knowing consent, 187
- Knowing falsehood, 142–143
- Labor unions, 124
- Lanham Act, 370, 373, 520–523  
elements of a claim, 521  
plaintiff's remedies, 523  
sample cases, 522–523
- Law, sources of, 4–12
- Law enforcement records, 261–262
- Law libraries, 6, 7
- Law of equity, 9
- Lawfully obtained news, 197
- Lawyers' rules of conduct, 284
- Legal brief in appellate procedure, 29
- Legal obligation to sources, 311–312
- Legal procedure. *See* Judicial process
- Legal remedies, 12, 28–29
- Legitimate public interest, 194–195
- LexisNexis, 12
- Liability for illegal ads, 531
- Libel,  
by implication, 126–127  
insurance for, 164  
lawsuit elements in, 121  
reform efforts, 171–173  
and slander defined, 119  
trade, 124  
*see also* Defamation; Protections for defendants in libel cases
- Liberty versus government power, 43–44
- Library of Congress, U.S. Copyright Office, 321

- License renewals in broadcast licensing, 398–402
- Licensing
  - First Amendment and, 36, 37, 48–49
  - see also* Broadcast licensing
- Licensing agreements in copyrights, 337–340
  - cable retransmissions, 343–345
  - electronic rights, 339–340
  - music licensing, 340–343
  - performance rights societies, 342–343
  - see also* Copyrights; Music licensing
- Licensing process, 8
- “Likely to mislead reasonable consumer,” 510–511
- Limited-purpose public figures, 149
- Litigants in pretrial procedure, 26
- Living persons and businesses in libel case, 123–124
- Local Radio Multiple Ownership Rule, 405
- Local TV Multiple Ownership Rule, 405–406
- Local Radio/TV cross-ownership rule, 406
- Lapse of time, 197–198
- Law and order, 88–93
- Law categorization, 12–14
- Legitimate public interest, 194–195
- Liability for illegal ads, 531
- Mad Dog Irvin, 273–274
- Madison, James, 40, 41, 57, 88
- Magazines and books, appropriation of names or likeness by, 181–182
- Majority opinions in the U.S. Supreme Court, 30–31
- Malice, 14
- Malicious gossip, 130
- Malicious prosecution, 163
- Marital ownership, 329
- Marshall, Justice Thurgood, 54, 79, 95
- Mass communication, 21
- Master use licenses, 341
- Material representation in deceptive advertising, 511
- Media
  - access laws, 54–55
  - constitutional privilege, 132
  - corporations, 74
  - counterattacks by in libel litigation, 163
  - defamation cases, 118
  - defendants, 310
  - forced disclosure of media information and sources, 305–307
  - law hotlines, 262–263
  - possessions confiscated in trespass, 237
  - privileges, 157
  - relationship with the justice system, 268, 270
  - ride-alongs with police, 233–235
  - see also* Access; Ethics; Forced disclosure of media information and sources; Justice system
- Meese Commission, 453, 457, 461
- Meiklejohn, Alexander, 39
  - Free Speech and Its Relation to Self-Government*, 59
- Merrill, John, *Imperative of Freedom, The*, 57
- Military secrets, 87
- Miller test, 453–460, 469, 485
- Milton, John, *Areopagitica*, 36
- Minimum-contacts test for personal jurisdiction, 22
- Minimum scrutiny, 62
- Minority ownership in broadcast licensing, 396–398
- Misappropriation of names or likeness, 179
- Model releases or photo consent forms, 186
- Model Rules of Professional Conduct*, American Bar Association, 284
- Model State Trademark Bill, 363
- Moral issues in copyrights, 332–333
- Motion picture censorship, 466–467
- Motion pictures, 382
- motion to suppress in pretrial procedure, 28
- Motions in pretrial procedure, 28
- Music licensing, 340–343
  - American Society of Composers, Authors and Publishers (ASCAP), 342
  - Broadcast Music, Inc. (BMI), 342
  - consent, 341
  - Master use licenses, 341
  - performance licenses, 341–342
  - performance rights societies, 342–343
  - pirating intellectual property, 320, 361
  - synchronization license, 341
  - see also* Licensing agreements in copyrights
- Must-carry rules in cable television controls, 408–411
- Marketing in the new media, 527–531
  - consumer privacy, 530–531
  - deception on the net, 527–528
  - liability for illegal ads, 531
  - net neutrality, 529–530
  - personal information collection, 530
  - spamming, 528
  - telemarketing calls, 530
  - text messages, 530
  - traffic diversion, 529
- Meeting, defined, 240–241
- Memoirs of a Woman of Pleasure* (John Cleland), 450
- Multipoint Distribution Service (MDS) microwave systems, 442
- Name privacy, 193
- National Archives, 6
- National Association of Attorneys General (NAAG), 524
- National Conference of Commissioners on Uniform State Laws, 172
- National Public Radio, *All Things Considered*, 447
- National Reporter System*, 20
- National security, 93–99
  - First Amendments rights and, 93–94
  - H-bomb case, 96–97
  - patriot act, 98–99
  - pentagon papers case, 94–96
  - wartime access restrictions, 97–98
- National trademark searches, 363
- National TV Multiple Ownership Rule, 406
- Negligence, 14
- Negligence standard (Gertz), 145–147
- Negligence versus incitement, 99–100
- Neutral reporting, 159–160
- New York Society for the Suppression of Vice, 451
- News content, appropriation of names or likeness, 180, 181–182
- News promos, appropriation of names or likeness, 183–184
- News video and fair use, 353–354
- Newspaper/Broadcast Cross-Ownership Rules, 406
- Newsrack placements, 58
- Newsworthiness defense standard, 194–200
  - ethical concerns, 199
  - humiliation for its own sake, 195–197
  - lapse of time, 197–198
  - lawfully obtained news, 197
  - legitimate public interest, 194–195
  - see also* Private facts disclosure
- NEXIS, 339
- Nixon, Richard, 39, 94, 249, 351, 504
- Nominal damages in trespass, 236
- Nonobscene material, 467–473
- North American Free Trade Agreement, 24
- Notice in copyrights, 327, 333–334
- Notice of Apparent Liability for Forfeiture, 390, 479–480
- Notice of copyrights, 334
- Nuclear Regulatory Commission, 244
- National Endowment for the Arts (NEA), 471
- Natural effect, 126
- Nebraska press case, 279–280
- Network Advertising Initiative (NAI), 531
- Network nonduplication rule, 442
- O'Dwyer's Directory of Public Relations Firms, 324
- Obscenity and indecency, 446–487
  - attacking obscenity, 460–467
  - background, definitions, and history, 446–449
  - broadcast media, 432, 470–482
  - cable TV, 482–483
  - Child Online Protection Act, 485–487
  - child pornography, 459–460
  - Child Pornography Prevention Act of 1996, 459
  - Communications Decency Act, 485
  - and the constitution, 451–452
  - control on nonobscene material, 467–473
  - defining obscenity, 453–460
  - early American obscenity law, 450–451
  - federal statutes, 462–464
  - “Filthy Words” monologue, 474, 478, 481, 483
  - funding conditions, 471
  - indecency, 473–487
  - indecency versus obscenity, 437, 473
  - Internet, 484–487
  - laws on, 12
  - lack of serious value, 456–459
  - Meese Commission, 453, 457, 461

- Obscenity and indecency (*Continued*)  
 Miller test, 453–460, 469, 485  
 Motion picture censorship, 466–467  
 Notice of Apparent Liability for Forfeiture, 390, 479–480  
 patent offensiveness, 455–456  
*Penthouse* and *Playboy*, 457–458  
 performance artists, 471  
 postal controls, 467–468  
 presidential commissions, 453  
 prior restraint, 465–467  
 private possession of obscenity, 465  
 prurient interest, 454–455  
 RICO Act, 463  
 scienter (criminal knowledge requirement), 464–465  
 state statutes, 460–462  
 telephone (“dial-a-porn”), 483–484  
 Texas, 460, 461, 462  
*United States Code*, 463  
 women’s rights, 472  
 zoning, 468–471
- O’Connor, Justice Sandra Day  
*Adarand Constructors, Inc. v. Peña*, 398  
*Feist Publications, Inc. v. Rural Telephone Service Co.*, 324  
*Lorillard Tobacco Co. v. Reilly*, 502  
*Metro Broadcasting v. FCC*, 396–397  
*National Endowment v. Finley*, 471  
*Philadelphia Newspapers, Inc. v. Hepps*, 130, 150  
*Turner Broadcasting System v. FCC* (*Turner II*), 440
- Offensive disclosure standard, 193–194  
 and intrusion upon physical seclusion, 204–208
- Official proceedings, reports of, 157–159
- Omission in deceptive advertising, 508–510
- Online Copyright Infringement Liability Limitation Act, 357
- Open meeting laws. *See* Government proceedings; State open meeting laws
- “Operation Waistline,” Federal Trade Commission, 505
- Opinion versus fact, 131
- Ordinances, statutory law, 7
- “Original works of authorship” in copyrights, 321
- Originality in copyrights, 322–325
- Outrage (intentional infliction of emotional distress), 214
- overbreadth and vagueness, 62–63
- Ownership limitations in broadcast licensing, 403–407
- Office of Government Information Services (OGIS), 258
- Online Copyright Infringement Liability Limitation Act, 357
- OPEN Government Act of 2007, 258
- Origins of privacy law, 176–179
- PACs. *See* Political action committees
- Pamphleteering, anonymous, 57
- Paparazzi, 218
- Parallel citations, 12
- Parody, 354–355
- Partnerships, 75, 124
- Patent law, 323
- Peeping Tom statutes, 207
- Peer-to-peer piracy on Internet, 359–361
- PEG channels, 437
- Pentagon papers, 94–96
- Penthouse* (magazine), 457–458
- Performance artists, 471
- Performance licenses, 341–342
- Performance rights societies, 342–343
- Perjury, 62
- Permissible closed sessions, 241–242
- Personal attack rule in broadcast licensing, 384, 424–427
- Personal injury, 99–113  
 harm from advice or instructions, 104–110  
 harm through advertising, 110–113  
 harm through imitation, 100–104  
 negligence versus incitement, 99–100  
*see also* Risks to public safety
- Personal jurisdiction, 14, 21, 22  
 minimum-contacts test for, 22
- Persuasive authority, 10
- Photo consent forms, 186
- Photo stalking, 218
- Photographic and electronic recording equipment, 208
- Pied Piper, 100–101
- Pirating intellectual property, 320, 361
- Plaintiffs  
 awarding damages in libel cases, 154  
 identification in libel cases, in libel cases, 154  
 limits on damages in libel cases, 155  
 matters of private concern in libel cases, 155–156  
 in pretrial procedure, 26
- Playboy* (magazine), 151, 152, 354, 364, 457, 529
- Pleadings in pretrial procedure, 26
- Plurality opinions in the U.S. Supreme Court, 30
- police, ride-alongs with, 233–235
- Police and fire communications, 233
- Police records. *See* Law enforcement records
- Police searches in forced disclosure of media information and sources, 313
- Political action committees (PACs), 57, 80
- Political broadcasting, 414–429  
 advertising rates, 422–423  
 bona fide news exemptions in, 417–419  
 candidate access rule, 421–424  
 debates, 419  
 equal opportunities rule, 416–421  
 free air time, 423–424  
 Zapple doctrine, 421  
*see also* Broadcast content controls
- Political campaign speeches, 158
- Political contributions versus independent expenditures, 78
- Political editorial rule, 384
- Political parties, 136
- Political process protection, 74
- Polling places, 238
- Pornography  
 computer-generated, 448  
 defined, 448  
 history of, 449–450  
*see also* Obscenity and indecency
- Portion of work used in fair use doctrine, 348
- Postal controls in obscenity and indecency, 467–468
- Powell, Justice Lewis  
*Branzburg v. Hayes*, 303–304  
*Central Hudson Gas & Electric Co. v. Public Service Comm’n of New York*, 494–495, 496, 499, 500, 532  
*Gertz v. Robert Welch, Inc.*, 145–146, 150, 155, 156
- Powell, Lord Justice, 450
- Precedent, doctrine of, 10–11
- Precedent application and federal jurisdiction, 17–19
- Preferred position balancing, 64
- Preliminary hearing in pretrial procedure, 27
- Preponderance of evidence, 12
- President’s Commission on Obscenity and Pornography, 453
- Press passes, 264–265
- Presumed damages, 154
- Pretrial procedure, 26–28  
 in civil cases, 26–27  
 in criminal cases, 27–28  
 in criminal trials, 286–290  
*see also* Judicial process
- Pretrial suppression hearing, 28
- Print media and broadcast licensing, 378, 382
- Printing press, 36
- Prior restraints, 38, 47–50, 61, 270, 278, 465–467
- Prison access, 239
- Privacy, 13, 176–227  
 appropriation of names or likeness, 186–189  
 Children’s Online Privacy Protection Act (COPPA), 225, 530  
 criminal statutes, 204, 207, 218–221  
 data collection (spyware), Internet, 224–225  
 e-mail and websites, 223–224  
 Electronic Communications Privacy Act of 1986 (ECPA), 220, 223  
 expectation of privacy, 204–206  
 false light, 179, 200–203  
 Federal Wiretap Act of 1968, 220, 221  
 four torts, 178–179  
 fraud, 213–214  
 hidden cameras, 209–210  
 identity betrayal, 218–219  
 intentional infliction of emotional distress, 204, 214–217  
 and the Internet, 222–227  
 intrusion upon physical seclusion, 179, 204–212  
 origins of law, 176–179  
 photo stalking, 218  
 private facts disclosure, 178, 190–200  
 recording and intercepting calls, 219–221

- related torts, 212–218
- trespass, 217–218
- see also* Appropriation of names or likeness; False light; Intrusion upon physical seclusion; Private facts disclosure
- Privacy Protection Act of 1980, 313, 316
- Private defendants in libel cases, 155–156
- Private facts disclosure, 178, 190–200
  - determining, 198
  - private life, 191–193
  - highly offensive disclosure, 193–194
  - name privacy, 193
  - news worthiness defense, 194–200
  - private facts standard, 191–193
  - public settings, 211–212
  - public record privilege, 192
  - public records, 192–193
  - see also* Newsworthiness defense standard; Privacy
- Private facts standard, 190–193
- Private lawsuits in commercial advertising content, 492
- Private persons in libel cases, 146, 147, 148, 153
- Private possession of obscenity, 465
- Private residences, 204
- Procedural rules versus substantive rules, 25
- Product disparagement, 124
- Product endorsement, 180, 516
- Products, 123–124
- Professions, 136
  - advertising in, 493
- Program-length commercials, 427
- Program ratings and v-chip, 432–433
- Program ratings systems, 432–433
- Programming diversity in broadcast licensing, 402
- Programming requirements in children's television, 428–429
- Prohibition, 47, 381
- "Project Workout," Federal Trade Commission, 505
- Protected opinion, 131–132
- Protected works in copyrights, 321–326
- Protections for defendants in libel cases, 156–165
  - anti-slapp statutes, 163–164
  - counterattacks by the media, 163
  - libel insurance, 164
  - neutral reporting, 159–160
  - reports of official proceedings, 157–159
  - retraction statutes, 161–162
  - statutes of limitations, 165
  - summary judgment, 162–163
  - wire service defense, 160–161
- Protections of the First Amendment, limitations to, 60, 62
- Prurient interest, 454–455
- Public criticism of judges, 315
- Public domain in copyrights, 330
- Public figures in libel cases, 148, 149–150
- Public forum, 69
- Public Health Service Act, 83
- Public inspection file in broadcast licensing, 399
- Public interest in broadcast licensing, 383, 384, 391, 392, 394
- Public issues and corporate speech, 80–81
- Public officials in libel cases, 148–149
- Public settings
  - and intrusion upon physical seclusion, 204
  - and private facts disclosure, 191
- Public record privilege, 157
- Public records and private facts disclosure, 192–193
- Public safety. *See* Risks to public safety
- Public stock exchanges, 75
- Publication (dissemination) to third parties, 135
- Publication prohibitions through court injunctions, 47–48
- Publicity
  - and fair trials, 276–277
  - pretrial and trial publicity, 272
  - right of, 179
- Publisher tort liability, 165–166
- Puffery or puffing, 510
- Punishment, 12
- Punishment after the fact or subsequent sanctions, 50–52
- Punitive damages, 154
- Purpose and character of use in fair use doctrine, 348
- Postal controls, 467–468
- Presidential commissions, 453
- Prior restraint, 465–467
- Private possession of obscenity, 465
- Qualified privilege, 157
- Quest for fair trials, 270–278
- Racist or sexist speech prohibitions, 51
- Radio Act of 1927, 380, 385, 416
- Radio frequency allocation, 380–381, 388–390
- Radio hoaxes, 431
- Radio spectrum, 379
- Radio/TV cross-ownership rule, 406
- Rape victims, 218
- Reagan, Ronald, 45, 417, 453, 462, 505
- Reardon Report*, American Bar Association, 278
- Rational basis standard, 62
- Reasonable care, 146–147
- Reasonable doubt, 12
- Reckless disregard, 143–145
- Refuse advertising, 531–532
- Registration
  - of copyrights, 333–334
  - of trademarks, 365–371
- Regulatory agencies, 244
- Rehnquist, Chief Justice William
  - Bates v. State Bar of Arizona*, 494
  - City of Renton v. Playtime Theatres, Inc.*, 469
  - on the First Amendment, 67
  - Hustler Magazine v. Falwell*, 214–216
  - Jenkins v. Georgia*, 455
  - Milkovich v. Lorain Journal Co.*, 131–132, 150
- Religions, 136
- Remanded judgment in appellate procedure, 29
- Remedies for violation, 245
- Renewal expectancy, 401–402
- Report of the President's Commission on the Assassination of President John F. Kennedy, 275
- Reporters Committee for Freedom of the Press, 252
- Reporter's privilege (First Amendment), 283
- Reports of official proceedings, 157–159
- Representation or omission in deceptive advertising, 508–510
- Reputation, 116–117
  - threat to, 122–123
  - see also* Defamation
- Required disclosures in advertising, 503
- Resolving conflicts, 59–69
- Respondent in appellate procedure, 29
- Retraction statutes in libel, 161–162
- Retransmission consent in cable television controls, 343–345
- Reversed judgment in appellate procedure, 30
- Rhetorical hyperbole, 126
- Richmond rationale for access, 286–287
- RICO Act, 463
- Ride-alongs with police, 233–235
- Rideau's confession film, 274
- Right of publicity, 179
- Rights of criminal defendants, 27
- Risks to public safety, 86–113
  - ensorship, 86–88
  - clear and present danger, 89–91
  - H-bomb case, 96–97
  - incitement standard, 91–93
  - law and order, 88–93
  - national security, 93–99
  - pentagon papers case, 94–96
  - personal injury, 99–113
  - sedition act of 1798, 88
  - wartime access restrictions, 97–98
  - see also* Personal injury
- Right to refuse advertising, 531–532
- Rudiments of broadcast regulation, 379–388
  - in communications act of 1934, 381–382
  - government options for, 380–381
  - limited first Amendment status, 382–388
  - limited resource, 379–380
  - scarcity rationale, 383–384
  - use of the spectrum, 379–381
- Safe harbor hours, 475–478
- Satellite carry-one, carry all rule, 443
- Satellite communications, 389
- Satellite Home Viewer Act of 1988, 344
- Satellite Home Viewer Improvement Act of 1999 (SHVIA), 443
- Scalia, Justice Antonin, 52
- Scarcity rationale in broadcast licensing, 383–384, 407, 414–415
- Scienter (criminal knowledge requirement), 464
- S.Ct. (*Supreme Court Reporter*), 11, 19

- Search warrants, 313
- SEC. *See* Securities and Exchange Commission
- Second Restatement of the Law of Torts*, 121, 137, 158
- Secondary meanings and trademarks, 364
- Securities and Exchange Commission, 8, 75, 76, 77, 244, 246, 388
- Rule 10b-5, 75, 76
- Sedition Act of 1798, 88
- Seditious libel, 37, 38, 42, 120
- Selective access by government, 263–265
- Selective Service System, 68
- September 11, 2001 terrorist attacks, 42, 294 *see also* Terrorism
- Sequestration of the jury as alternative to gag order, 280
- Service marks, 362
- Settlement in pretrial procedure, 27
- Sexist speech prohibitions, 49
- Sexually explicit materials. *See* Obscenity and indecency
- Shield laws, 308–311
- Shocking news content and tactics, 216–217
- Siebert, Frederick S., *Freedom of the Press in England*, 40
- Sixth Amendment, 5, 41
- and fair trials, 271
- and forced disclosure of media information and sources, 309–310
- Slander and libel defined, 119
- see also* Defamation
- SLAPP (strategic lawsuits against public participation), 163–164
- Slavery and slaves, 43, 89
- Smith Act of 1939, 90–91
- Social reasons for freedom of speech, 38–39
- check on government, 39
- discovery of truth, 38
- participation in democracy, 38–39
- social stability, 39
- Society of European Stage Authors & Composers (SESAC), 342
- Society for the Suppression of Vice, 450
- Society of Professional Journalists, 292
- Freedom of Information Award, 286
- Sole proprietorships, 75
- Sonny Bono Copyright Term Extension Act (1998), 330
- Sound recordings in music licensing, 341, 342
- Sources
- confidential, 270
- forced disclosure of media information and sources, 302–313
- Sovereign immunity doctrine, 19
- Sovereign nations, 24
- Sovereign states, 3, 19
- Space communications, 389
- Special damages, 154
- Spectrum allocation in broadcast licensing, 389
- Speech. *See* First Amendment; Freedom of speech
- Sponsor identification, 429–430
- Sporting events proprietary control, 235
- Spyware Control Act (Utah), 226
- Standard of judicial review, 64
- Star Chamber, Court of the, 114, 118, 270
- State action and the First Amendment, 44, 59
- State advertising laws, 524–527
- class action, 525
- federal preemption, 525–527
- government prosecution, 524–525
- private lawsuits, 525
- State attorneys general, 492
- State constitutions, 5
- State jurisdiction, 19–25
- determining proper court system, state courts, 20–21
- State laws in advertising, 492
- State libel law, 138
- State open meeting laws, 240–243
- groups subject to the laws, 240
- "meeting" defined, 240–241
- notice requirement, 241
- permissible closed sessions, 241–242
- remedies for violation, 245
- see also* Access; Government proceedings; State open records laws
- State open records laws, 259–263
- exceptions, 259–260
- law enforcement (police) records, 261–262
- media law hotlines, 262–263
- see also* Access; Freedom of Information Act (FOIA); Government records
- State registration of trademarks, 366
- State shield laws, 308–311
- State statutes on obscenity and indecency, 460–462
- States
- as democracy laboratories, 19
- sovereign, 3, 19
- Station identification and call signs, 393
- station licensing, 391–411
- statutes of limitations, 165
- Statutory damages in copyright infringement, 336
- statutory law, 6–7
- finding statutes, 7
- administrative law, 7–9
- finding regulations, 8–9
- United States Code* (U.S.C.), 7
- Stevens, Justice John Paul, 398
- Bartnicki v. Vopper*, 221
- Federal Communications Commission v. Pacifica Foundation*, 476
- Greater New Orleans Broadcasting Association, Inc. v. United States*, 501
- Harte-Hanks Communications, Inc. v. Connaughton*, 143–144, 150
- McIntyre v. Ohio Elections Commission*, 54–55
- Philadelphia Newspapers, Inc. v. Hepps*, 150
- Reno v. ACLU*, 485
- Richmond Newspapers, Inc. v. Virginia*, 288
- Sony Corp. of America v. Universal City Studios, Inc.*, 349–350
- U.S. Department of Justice v. Reporter's Committee for Freedom of the Press*, 250
- Stewart, Justice Potter, 95, 118, 274
- Stock exchanges, 75
- Stock market crash of 1929, 75
- Strict liability, 14, 137, 138
- Strict scrutiny, 64, 67
- Student press, 70–74
- Subject matter jurisdiction, 15
- Subpoenas, 302
- protections against, 309
- Subsequent sanctions, 50–52
- Substantial interest, 67
- Substantial similarity in copyrights, 335–336
- Substantive rules versus procedural rules, 25
- Subterfuge and intrusion upon physical seclusion, 208–211
- Summary judgment in pretrial procedure, 27
- Sunshine Act of 1976, 243
- Suppression hearings, 28
- Supreme Court Reporter* (S.Ct.), 11, 19
- Supreme courts
- state, 19
- see also* U.S. Supreme Court
- Suspect restrictions, 47–59
- Symbolic speech, 45
- Symbols for identifying trademarks, 365, 370
- Synchronization license, 341
- Syndicated program exclusivity rule (syndex), 442
- Syracuse Peace Council decision, 425
- Tagging Along with Police, 233–235
- Tangible medium, 325
- Taping telephone conversations for broadcasting, 220–221
- Taxes, First Amendment and, 53–54
- Telecommunications Act of 1996, 379, 382, 396, 398–399, 401, 403, 404, 405, 407, 412, 432, 437, 485
- Telephone conversations, taping for broadcasting, 220–221
- Telephone ("dial-a-porn"), 483–484
- Television
- children's, 427
- and libel, 124
- violence on, 102–103
- see also* Harm through imitation of video broadcasts
- Terrorism, 87, 91, 98
- war on, 42
- see also* September 11, 2001 terrorist attacks
- Threat to reputation, 122–123
- Time lapse in newsworthiness defense standard, 199
- Time, place, and manner (TPM) restrictions, 57–59
- TLDs. *See* Top-level domain names
- Tobacco products advertising, 502–503
- Top-level domain names (TLDs), 369
- Tort liability for communicators, 165
- Torts
- contracts versus, 13–14
- crimes versus in defamation cases, 120
- strict liability, 14, 137, 138

- TPM restrictions. *See* Time, place, and manner (TPM) restrictions
- Trade libel, 124
- Trade name, 362
- Trade regulation rules, 515
- Trade-Related Aspects of Intellectual Property Rights (TRIPS), 346
- Trademarks, 361–371
- Anticybersquatting Consumer Protection Act (ACPA), 371
  - creation of, 363–365
  - defined, 361
  - dilution of, 367–368
  - distinctiveness of, 364–365
  - and domain names, 369–371
  - Federal Registration, 365–366
  - Federal Trademark Dilution Act of 1995, 367
  - infringement of, 366–367
  - model State Trademark Bill,
  - national trademark searches, 363
  - registration of, 365–371
  - secondary meanings and, 364
  - service marks, 362
  - state registration of, 366
  - symbols for identifying trademarks, 365, 370
  - trade name, 362
  - United States Trademark Association, 363
  - U.S. Patent and Trademark Office, 363
  - use in commerce, 363
  - see also* Intellectual property
- Traditional analysis, 166–167
- Transfer of licenses in broadcast licensing, 402–403
- Trespass, 14, 217–218
- confiscation, 236–237
  - contractual limitations, 235
  - criminal trespass, 236
  - custom and usage, 232
  - damages and nominal damages, 236
  - defined, 230
  - determining, 236
  - entertainment and sporting events
    - proprietary control, 235  - express or implied consent, 232–233
  - and intrusion upon physical seclusion, 204
  - and privacy, 204, 236
  - tagging Along with Police, 233–235
  - see also* Access
- Trial courts
- federal, 17
  - state, 17
- Trials
- access to criminal trials, 286–290
  - cameras in the courtroom, 295–298
  - gag orders on participants, 283–285
  - high-profile, 268
  - procedure of, 28–29
  - see also* Criminal trials; Fair trials; Jury trials; Justice system
- “Truth suits,” 162
- Truthful commercial speech, 67, 498
- UCCDA. *See* Uniform Correction or Clarification of Defamation Act
- UHF television, 389
- Unfair competition law, 322, 332, 372, 373
- Uniform Correction or Clarification of Defamation Act (UCCDA), 172
- United Nations, International Court of Justice, 24
- United States Code* (U.S.C.), 7
- United States Government Manual*, 252
- United States Supreme Court Reports, The* (U.S.), 19
- United States Trademark Association, 363
- Universal Copyright Convention (UCC), 346
- Universal rights (natural law), 40
- Unprotected speech, 60, 62
- U.S. Attorney General’s Commission on Pornography, 449
- U.S. Congress
- copyright laws, 7, 16
  - and the First Amendment, 42
  - and flag desecration, 45
- U.S. Constitution
- adoption of, 5, 41–42
  - Amendments of, 5, 41–42, 43
  - bill of rights, 5, 41, 43
  - and FCC powers, 355
  - freedom of speech in, 5, 41
  - freedom of the press in, 40
  - influence of, 13
  - interpretation of by the courts, 41–42
  - National Archives, 6
  - and obscenity and indecency, 451–452
  - sovereign states, 3, 19
  - see also* Bill of Rights; specific Amendments
- U.S. Copyright Office, Library of Congress, 321
- U.S. Court of Appeals, 17, 31, 74
- U.S. Department of Defense, 97
- U.S. Department of Energy, 96
- U.S. District Courts, 17
- U.S. Fish and Wildlife Service, 234
- U.S. Justice Department, 87, 473
- U. S. legal system, 1–33
- administrative law, 7–9
  - case law, 9–12
  - civil law versus criminal law, 12–13
  - constitutional law, 4–6
  - contracts versus torts, 13–14
  - court systems and jurisdiction, 14–25
  - cyberspace, 21–22
  - federal jurisdiction, 15–19
  - importance of studying, 1–4
  - international jurisdiction, 23–25
  - judicial process, 25–31
  - law categorization, 12–14
  - law sources, 4–12
  - pretrial procedure, 26–28
  - state jurisdiction, 19–25
  - statutory law, 6–7
- US* (magazine), 184
- U.S. Patent and Trademark Office, 363, 365
- U.S. Post Office Department, 467
- U.S. Supreme Court, 6, 18, 19
- access or PEG channels, 437
  - access to jails and prisons, 239
  - access to law enforcement records, 250–252
  - actual malice, 141–145, 203
  - advertising in the professions, 494
  - alcoholic beverages, 499–501
  - appropriation cases, 180
  - in balancing approach, 63–67
  - cable retransmissions, 343–345
  - cable television, 434, 440
  - cameras in the courtroom, 296, 298
  - candidate access rule, 421–422
  - casino advertising, 501
  - change of venue, 273
  - Child Online Protection Act, 485–786
  - child pornography, 459–460
  - clear and present danger standard, 99
  - closed criminal proceedings, 285, 288–291
  - commercial advertising ruling (1942), 11
  - commercial speech, 492–503
  - Communications Decency Act, 485
  - compilations, 324
  - confession film, 274
  - confidentiality expectations, 311–312
  - confidentiality in juvenile proceedings, 218–219, 220, 294
  - copyright duration terms, 331
  - courtroom access rights, 286–287
  - deceptive advertising, 511–512
  - dilution in, 367–368
  - electronic rights in, 339–340
  - embellishment in false light, 201–202
  - executive privilege, 249
  - fabricated quotes, 142–143, 150
  - and fair trials, 272–276
  - fair use doctrine, 347–355
  - false light privacy cases, 201–202
  - federal preemption, 525–527
  - “Filthy Words” monologue, 474, 478, 481, 483
  - Fourth Amendment search warrant violations, 233
  - free press/fair trial controversy, 272–276, 278–285
  - gag orders, 278–285
  - indecency in cable television, 442, 478, 481–483
  - Internet copyright infringements, 355–357
  - jury selection phase, 288–290
  - justices in 2002, 31
  - libel cases, 120, 150
  - media publicity, 274–275, 27–278, 288, 291
  - minority ownership, 396–398
  - motion picture censorship, 466–467
  - negligence standard, 145–147
  - and obscenity, 448, 451–452, 454
  - parody, 354–355
  - Pentagon Papers, 48, 94–98, 279
  - performance artists, 471
  - pretrial proceedings, 282, 290–291
  - private facts torts, 190–200, 220, 221
  - private possession of obscenity, 465
  - proving falsity in libel, 130, 131, 132
  - public and private concern in libel, 150
  - public criticism of judges, 315



- U.S. Supreme Court (*Continued*)
  - public records, 192–193
  - reckless disregard, 143–145
  - scarcity rationale, 383–384, 407, 414–415
  - scope of protected opinion, 131–132
  - search warrants, 313
  - Smith Act convictions, 90–91
  - substantial interest, 67
  - summary judgment in public person libel cases, 163–164
  - telephone (“dial-a-porn”), 483–484
  - unfair competition law, 322, 332, 372, 373
  - work made for hire, 327–328
  - zoning for sex-oriented businesses, 468–469
- U.S. Supreme Court First Amendment cases, 18
  - abortion counseling or advocacy, 83
  - attribution requirements, 56–57
  - clear and present danger, 89–91
  - compelled financial support, 55–56
    - content-neutral test (Minnesota State Fair), 58, 67
  - court injunctions prohibiting publication, 47–48, 51, 94, 382
  - criminals profiting from their stories, 53
  - dancing and nude dancing rulings, 45
  - editorializing by federally funded television and radio stations, 83
  - Federal Election Campaign Act, 78–79
  - financial news releases, 76–77
  - First Amendment /Sixth Amendment dilemma, 271
  - flag burning as expressive conduct, 46, 68
  - hate-speech case, 52
  - incitement standard, 91–93, 106, 113
  - intermediate scrutiny/draft card burning, 67–69
    - on licensing schemes, 49
    - on public issues, 80–81
  - nonpublic forums, 69
  - obscenity test, 62
  - pentagon papers, 94–96
  - political expenditure prohibition, 75
  - profane speech, 64
  - right-of-reply statute, 55, 384–386
  - selective taxation in Arkansas, 54
  - Smith Act prosecutions, 90–91
  - state government limits, 43
  - student press, 70–74
- U.S. (*United States Supreme Court Reports, The*), 19
- USA Patriot Act, 256
- U.S.C. (*United States Code*), 7
- V-chip, 432–433
- Vagueness and overbreadth, 62–63
- “Veggie libel” laws, 124
- Venue, change of, 273
- VHF television, 389
- Video broadcasts. *See* Harm through imitation of video broadcasts
- Video news releases (VNRs), 430
- Void-for-vagueness doctrine, 63
- Vortex public figures in libel law, 149, 153
- Waiver of free speech rights, 82–83
- Warranties in advertising, 516
- Warren, Chief Justice Earl, 512
- Warren Commission Report, 275
- Wartime access restrictions, 97–98
- Watch and Ward Society, 451
- Website comments, 283
- Website privacy, 223–224
- Websites, 182, 448
  - see also* Internet
- Westlaw, 12
- White, Justice Byron
  - Branzburg v. Hayes*, 303
  - Cohen v. Cowles Media Co.*, 311
  - Cox Broadcasting Corp. v. Cohn*, 192
  - Hazelwood School District v. Kuhlmeier*, 70
  - Nebraska Press Association v. Stuart*, 272
  - Red Lion Broadcasting v. FCC*, 384–386
- Wire service defense in libel, 160–161
- Women’s rights in obscenity and indecency, 472
- Word of Mouth Marketing Association (WOMMA), 531
- “Words of warning” list for libel, 123
- Work made for hire and copyrights, 327–328
- Works of authorship, original, 321
- World Intellectual Property Organization (WIPO), 346
- World Trade Organization (WTO), 346
- Writ of certiorari, 30
- Yellow journalism, 178
- Zapple doctrine in political broadcasting, 421
- zoning for sex-oriented businesses, 468–469